THE CONSTITUTIONAL SYSTEM OF INDIA

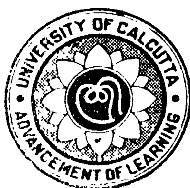
THE CONSTITUTIONAL SYSTEM OF INDIA

A Critical and Comparative Analysis

BY

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the relevant sections in its different chapters. It has been my objective to study them critically in the light of the experiences of other countries and the actual conditions which obtain in India. It has, of course, not been my purpose to make a highly specialised and minutely detailed study of the different factors of the Indian Constitution. That would carry us far beyond the limits which have been fixed for this publication. It has been my object on this occasion to place before the readers an estimate of the constitutional organisation of our country within a reasonable compass. The materials which have been used in the book have been drawn as far as possible from authoritative sources, and except in minor cases these sources have been mentioned in the foot-notes.

Since the contents of the book were set in type, the question of the special powers of the Governors has loomed large in the country. After the general elections of January and February, 1937, the Congress leaders demanded an assurance from the Governors of six provinces that the latter would never exercise these powers except on the responsibility of the Ministers themselves. The Governors of course failed to comply with this demand and in consequence the majority party in the Legislative Assembly of six provinces preferred to keep out and leave the Ministries to be formed by the leaders of the minority party in the Assembly. A tangled situation has thus been created. The Congress Executive is of opinion that it is open to the Governors to offer such an assurance even though the Act is not amended for this purpose.

Some of the British publicists also seem to share the views of the Congress. Lord Lothian, for example, has given it out as his opinion that if in connection with the exercise of the special powers of the Governors their Ministers do not see eye to eye with them and if the Ministers are supported by the Legislative Assemblies, these bodies should be dissolved and an appeal to the electorate should be made. If, as a result of the general election, the complexion of the Assemblies do not change and their views do not alter, the Governors must yield and their special powers must now be exercised only in conformity with the wishes of the Ministers. This stand-point, however, has been declared to be inconsistent with the purposes in view of the framers of the Act. They provided for responsible government in the provinces as well as in the centre no doubt. But this responsibility of the executive to the legislature was to be subject to the responsibility of the Governors and the Governor-General, in some particular matters, to Whitehall and through it to the British electorate. If now the responsibility of the Governors to the British Parliament cannot be enforced in these particulars, the Act will be violated thereby. The special powers of the Governors are a basic factor of the new constitution. It is another matter whether they are desirable or undesirable. But so long as the Act is not amended, they remain and cannot be regarded as non-existent.

This work must not be placed before the public without my obligations being duly acknowledged. I owe a debt of gratitude to Mr. Syama Prasad

Mookerjee, M.A., B.L., Barrister-at-Law, M.L.A., Vice-Chancellor, Calcutta University, for the personal interest he has so uniformly taken in the production of this book and the facilities he has extended to me for its publication. I offer him my sincere thanks for the consideration he has shown. Before the book was sent to the press it was carefully and very minutely read by my old teacher, Mr. Tripurary Chakrabarty, M.A., of the Calcutta University. I thank him for the pains he took on this occasion.* I also gratefully acknowledge the improvement which has been brought about in the quality of the book by his suggestions. Lastly, I offer my sincere thanks to the gentlemen of the Calcutta University Press, particularly the Superintendent, and Mr. B. L. Banerji, the Printer, for the prompt publication of the book.

19th May, 1937. N. C. ROY.

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* A mistake has inadvertently crept into the foot-note on p. 257. The Governor under Sec. 61(2) may dissolve the Assembly earlier but cannot extend its life beyond five years. This inadvertence was pointed out to me by Prof. Monoranjan Bhattacharyya, M.A., of Ripon College, Calcutta. I am grateful to him.

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CHAPTER I

Evolution of the Constitutional System

India is at present divided into two unequal portions and will continue to be so till all the States become partners of the contemplated federation. The first portion is known as British India and comprises two-thirds of the territory and more than three-fourths of the total population of the whole country. For ensuring administrative efficiency and for placating and accommodating local sentiments, it has been parcelled out into a number of provinces. The other portion comprises the Indian States which are, for internal purposes, independent of the control of the Government of India though they are even in this field subject to the ultimate authority of the British Crown which is the paramount power. There* are at present 562 such states of which 108 only are important. 327 may be regarded only as Estates and Jagirs accommodating less than one million inhabitants (801,674) out of the total of seventy million people of all the

* Report of the Indian States Committee, 1928-29, p. 10.

states together. But all the same, each state, big or small, important or minor, has a governmental establishment of its own.

The British Indian portion has grown from small proportions into its present size. When the *Dewani* was granted to the East India Company in 1765, the British authority was confined to the provinces of Bengal, Bihar and Orissa, the southern presidency of Madras and the western presidency of Bombay. Gradually during the next one hundred years the rest of the present British India was conquered and annexed to British authority. The right to exercise political power and administrative authority, when occasions for such exercise would arise, was originally conferred upon the Company by the Royal Charter which brought it into being. The commercial body had thus almost from the start not only the privilege of carrying on trade in this country but also the right of entering into treaties, alliances and wars with the other commercial or political powers. It was by the exercise of this latter privilege that the East India Company allowed itself to be implicated in the diplomatic and military tangle which for over two decades during the middle of the 18th century made politics so sordid and administration so unstable and inefficient in the south. It was also by the exercise of the same right that it allied itself with Mir Jafar Ali Khan against the reigning Nawab of Moorshidabad and ousted him from the throne by force which proved to be so decisive at Plassey.

But although under the authority conferred upon it by the English Charter, the Company

became the *de facto* master of a considerable portion of Indian territory, tradition and public opinion, as it was understood to be in those days, were such in this country that without a *Sunud* from the Emperor of Delhi the Company did not think it wise to stand forth openly as the ruler of its conquered provinces. However weak might be at this time the position of the Padishah of Delhi, he was still regarded as the fountain of all honour and the source of all power in India. All political privileges were thought to emanate from him and his sanction alone could regularise all exercises of administrative authority. Accordingly the British, after an exercise of irresponsible power behind the throne for about eight years, approached His Majesty the Emperor Shah Alam in 1765 and secured the grant of the *Dewani* for the three provinces of Bengal, Bihar and Orissa under some specified conditions. So it should be known that the legal authority under which the Company would henceforward carry on its government was vouchsafed to it on the one side by the Royal Charter and parliamentary enactments in England, and on the other by the Imperial *Sunud* in India.

During practically the whole period of Mughal rule, provincial administration was vested in two functionaries enjoying co-ordinate authority, the Subadar and the Dewan. The former was in charge of the departments of law and order and criminal justice, and the latter was charged with the collection and disbursement of revenue and the administration of civil justice. They were appointed by the Emperor and were independently respon-

sible to him alone. It was not till some time after the demise of Emperor Aurangzeb that in the *Suba* of Bengal the two offices became combined in the same hands, those of Nawab Murshid Quli Khan, who ruled this province with ability and credit till 1725. Since then up to 1765 the Nawabs exercised unfettered authority over both the spheres. Now, however, the two functions were again apparently bifurcated. The successor of Mir Jafar who died in this year was only to be the Nazim, while the English Company was to be the Dewan. As the two departments were entrusted to two authorities, we are told that for some years after 1765 there was Double Government in these provinces. In modern parlance it may be said that there was an experiment of Dyarchy. Actually, however, this Double Government or Dyarchy was only a misnomer, a myth. The Nawab became a puppet, a mere pensioner, and did not exercise any of the powers vested in him.* All his powers and duties were assigned to a Deputy, nominated by the British. Similarly, the English also did not take up the collection of revenue and the administration of civil justice in their own hands. They delegated them to the same functionary who discharged both the duties and exercised powers in both the spheres in responsibility to the Company's authority in Calcutta. In him therefore were concentrated powers which were in theory now bifurcated. So it cannot be said that, during the period of seven years extending from

* See an article on "Nawab Nazimuddoula and the English," by Dr. A. P. Dasgupta, *Calcutta Review*, November, 1936.

1765, there were two authorities working side by side. Administration might have been lax, unorganised and corrupt; but all the same it should be noted that its unity was maintained in fact, though not in theory. At last when in 1772, the Company "stood forth as the Dewan" and took up the administration in its own hands, it saddled itself with responsibility in both the spheres. It undertook duties as much of the Dewani, as of the Nizamat.

The affairs of the Company had all along been looked after, at all the three establishments of Calcutta, Bombay and Madras, by a Council with a President at its head. Usually the membership of such a Council extended from twelve to sixteen. All the members including the President who was also called the Governor, were appointed by the Court of Directors in London from among the superior servants of the Company. The three Councils were absolutely independent of one another and were directly responsible for everything they did, to the Court of Directors at Leadenhall Street. The Council adopted resolutions and came to decisions by a majority of votes. Everything had in fact to be done on the authority of the Council. The Governor-President was the executive head of the Company in his province and was responsible for the execution of the decisions of the Council. But apart from the Council, he had no authority to make a decision on his own account. Nor could he override the decision of the Council and veto any rule or regulation passed by it. As the President of the Council, he had a casting vote in case of a

tie; otherwise he exercised as much authority at its table as any other member. So the Government was really collegiate in character. So long as the affairs of the Company were mainly commercial in nature and kind, no difficulty arose, and this form of government proved to be a success. Nor was the large membership of the Council a handicap. Deliberations were not expected to be very frequent and some of the members did not even stay in the headquarters. They were chiefs of factories in the mufassil and came to town at intervals to attend the council meetings which arrived at decisions in the light of their demands and experiences.

But when the President in Council became saddled with political responsibility, the lack of distinct authority on the part of the Governor and the large membership of the Council proved to be a positive handicap. The Court of Directors had sufficient knowledge of this fact and when it sent down Lord Clive for the second time as Governor in 1765, he was given plenary powers to set aside the Council if he found it unwieldy and obstructive, and go on with his work with the help of a select committee. But although such knowledge had dawned upon the Court and although on a particular occasion it allowed the Governor to act practically on his own responsibility, it did not think it necessary to make any permanent change in the form of government. So when the Company "stood forth as the Dewan" in 1772 and Warren Hastings was appointed to be the Governor of the Presidency of Bengal, his position was the same as that of the President of former times.

He was bound in every case by the decision of his Council and had no power to override it even when it might appear to him to be positively unwise. After he had acquired an experience of his position for more than a year, he placed his case before the Court of Directors. In a letter which he wrote to this body in November 1773,* he complained that " the powers of the Governor, although supposed to be great, are in reality little more than those of any individual in his Council." This was what should not be the fact. He insisted that " the President shall have the privilege of acting by his own separate authority on such urgent and extraordinary cases as shall in his judgment require it, notwithstanding any decision of the Council, or of the Committee passed thereon." This suggestion was ignored by the Court. As in Bengal, so in Madras and Bombay also, the Governor had no power to override the Council to meet an emergency or to avoid an inconvenient situation. He was bound by its decision at all events.

The system of government was otherwise modified in the course of a year by Lord North's Regulating Act, 1773, but the relations between the Governor and his Council continued as usual, all the same, for thirteen years more. It has already been pointed out that the East India Company derived its legal right to enjoy territorial authority in India partly from Royal Charters and parliamentary enactments in England, and partly from

* Keith, *Speeches and Documents in Indian Policy*, Vol. I, pp. 39-41.

the grant of the Mughal Emperor. The British Parliament had consequently the right to intervene in the affairs of the Company in this country from time to time and regulate them in the light of new situations that might arise. Its first intervention was of course of the character of a financial bargain. Many of the servants of the Company were now returning to England literally laden with gold and soon earned the appellation of *Nabobs*. The proprietors of stock were also being given an excellent dividend. It was thought in the fitness of things, therefore, that the British nation also should have a share of this windfall. Accordingly in 1767, an Act* was passed by the Parliament to the effect that for two years the Company would be required to contribute a yearly sum of £400,000 to the British treasury. It was on this condition that it would be allowed to enjoy its territorial sovereignty in India. When the two years period expired in 1769, a fresh agreement for five years was made with the Company. By this the latter was obliged to pay the annuity of the same sum to the Government Exchequer.

But the signs of a crash were already on the horizon. The great famine which raged in Bengal in 1770 and carried off one-third of its population was a calamity which had not been counted when the bargain was made. It hastened the bankruptcy of the Company, which was being slowly brought about by the rapacity of its servants, the mismanagement of its affairs and the incessant wars that it

* 7 Geo. III, c. 57.

was required to fight. Not only did the Company default in the matter of the payment of the stipulated annuity to the British Treasury, but what was more poignant still, it had to approach the Government in 1772 for a loan from the public. This gave the Government an opportunity to make an alteration in the constitutional arrangement of the Company in India. Something was thought to be rotten in the management of the affairs of the Company and a parliamentary enactment* was made in 1773 to rectify the situation.

This parliamentary enactment is generally known as the Regulating Act of Lord North. It made it obligatory for the Directors of the Company to transmit to the Treasury all correspondence from India relating to the management of its revenue and submit to a Secretary of State all copies of correspondence relating to the civil and military affairs. This ensured a closer supervision of the Company's administration of Indian territories by His Majesty's Government at Whitehall. But it will be found presently that the want of a separate machinery in the Government for such supervision handicapped the ministry to a great extent, and a decade later the Act required amendment in this aspect.

It of course effected changes in the governmental arrangement of all the three presidencies. The membership of the council was reduced everywhere to five including the head of the administration. But the relations of this head with his council were not improved. He still remained

* 13 Geo. III, c. 63.

bound by the decision of the majority in all cases. The overriding authority which Warren Hastings had claimed for him in emergencies was not allowed. As for the relations between the three presidencies, they were made closer and more intimate than before. The three Governments had so long been absolutely independent of one another. But henceforward the Government of Bengal was given some supervisory authority over the other two establishments. It was laid down that the Governments of Madras and Bombay would not be entitled to declare war or conclude peace without the previous assent of the Government of Bengal. But in cases of immediate necessity and in cases of special orders being received directly from the Court at London, such assent would not be necessary. As a mark of the superiority of position which was assigned to the Bengal Government, its head was given the name of the Governor-General while those of Madras and Bombay were called Governors. Again, as the judicial arrangement in Bengal was not thought sufficient and satisfactory, the Act authorised His Majesty the King of England to establish by Charter at Calcutta a Supreme Court of Judicature consisting of a Chief Justice and three puisne judges, all being barristers of England or Ireland of not less than five years' standing. It was further laid down that all the ordinances and regulations issued by the Governor-General in Council for the good government of the presidency must be duly registered and published in this Supreme Court of Judicature.

The Regulating Act of Lord North was a half-measure and could not ensure that smooth and

efficient administration which His Majesty's Government sought to introduce in this country. It, in fact, gave rise to friction in the relations between the different authorities which it set up. In the first place, the relations between the Governor-General and his Council turned out soon to be most unfortunate and unhappy. Nothing could be transacted without the majority being in its favour. But this majority took it into its head to obstruct and thwart every proposal that emanated from the Governor-General. For about four years Warren Hastings found a standing majority arrayed against him and his position became critical and humiliating. And while the chief object of the majority at the Council-Board was to checkmate the work of the head of the administration, public business suffered and efficiency was undermined. Secondly, the Supreme Court which was soon established with Sir Elijah Impey as the Chief Justice placed itself in opposition to Governor-General in Council, and as the relations between the two authorities were not clearly defined in the statute, opportunities for friction were many and collisions actually became frequent. Thirdly, the Madras and the Bombay authorities were unwilling to place themselves readily in subordination to the Government at Calcutta. The Act definitely declared, no doubt, the supremacy of the Governor-General in Council over the establishments in those two provinces But there were sufficient loopholes in it which enabled the latter Governments to snap their fingers at Calcutta. In cases of "imminent necessity as would render it dangerous to postpone" decision,

the two subordinate Governments were empowered to declare hostilities on their own account. Again, when direct orders came from Leadenhall Street, they might ignore the Government at Calcutta altogether. These provisions were utilised by them to the full, and many steps were taken and many decisions were reached by them without the approval of the Governor-General in Council.

The Regulating Act thus stood in need of amendment not many months after its enactment. It was necessary that its clauses which were obscure, defective and ambiguous should be made, without delay, clear, definite and precise. But it was not till 1784 that this Statute was replaced by a fresh one. True, an amending Act* passed in 1781 defined more clearly the jurisdiction of the Supreme Court and removed some of the anomalies of its position. But the main defects of the Act of 1773 still remained unrepealed. At last, in 1784, what is known as Pitt's India Act† was passed. It made in the first place the control of the Government of England over the policy of the Court of Directors in India more real and more stringent. A separate machinery was created for the exercise of such control. A Board of six Commissioners, which became commonly known as the Board of Control, was established, consisting of the Chancellor of the Exchequer, one of the Secretaries of State and four other members. Under the Act of 1784 these four members were to be privy councillors but in 1793 the Charter Act made it possible for two of them

* 21 Geo. III, c. 70.

† 24 Geo. III, s. 2, c. 25.

to be non-privy councillors. Up to the latter year, the Board was presided over by a Secretary of State. But in this year it was reorganised and a separate President was appointed who became Minister responsible for Indian affairs to the Parliament.

This Board was given access to all papers of the Company. All despatches received from and sent out to India by the Court of Directors had to be submitted to the Board whose orders and directions were binding upon the Company. The Board had the right to modify a despatch which the Court wanted to send out to India. It might even, in case of neglect and delay made by the Court, send out a despatch on its own account. The Court of Directors was thus placed definitely under the control of a Government department with regard to the administration of Indian affairs. It should not of course be assumed that the powers and authority of the Court were vitally affected by these provisions in the Statute. The patronage still remained exclusively vested in this body. Otherwise also the initiative in most matters still remained with it. But it could not do everything in its own way. There was an authority above to advise, to warn and to control. The situation can, perhaps, be best described by saying that a dual authority was set up in London to keep watch over the administration of the Company's territories in this country. It was this dual control which remained effective till 1858 when the Company was deprived of its political power and the government of India territories was transferred to the Crown.

The Act of 1784 modified to some extent the constitution of the authorities in India as well. The membership of the Governor-General's Council was reduced from four to three. Similarly the membership of the councils at Madras and Bombay was also fixed at three. But while the membership was reduced,* neither the Governors nor the Governor-General were given any authority to override their respective Councils. They were still to be bound by their decisions in every instance. The Governor-General and the Governors were to be appointed by the Court of Directors but they might be removed either by this body or by the Crown. The members of the Council were to be chosen from among the covenanted servants of the Company but the Governor-General, Governors and Commanders-in-Chief of the three presidencies might be chosen from outsiders. The Act instituted some changes in the relations between the Government of Bengal and those of Madras and Bombay. The provision of the Regulating Act of 1773 was grossly defective in this respect. This defect was now removed to a great extent. The control of the Governor-General in Council over the Governments of the southern and western presidencies was enlarged. The latter two still remained distinct and separate entities with full control over the internal affairs of their own provinces—control which they were to exercise, in peace times not in responsibility

* The purpose of the reduction was to strengthen the position of the Governor-General. If he had now the support of one member only, he could, by his casting vote, have his own measures passed by the Council.

to Calcutta but to London. But over the foreign policy of those provinces the supremacy of Calcutta was made definite and real.

Thus, except as regards the position of the Governor-General *vis-à-vis* his Council, the Act of 1784 was a distinct improvement upon the measure of 1773, and it practically determined the system of administration which was to remain in vogue in the Company's territories in India till 1833. As for the defect in the position of the Governor-General, that also had to be removed in 1786. Under the Act of 1784, the members of the different Councils were to be recruited only from among the covenanted servants of the Company. But the offices of the Governor-General, Governors and Commanders-in-Chief might be filled by outsiders as well. This option was taken advantage of and Lord Cornwallis was appointed in 1786 to succeed Warren Hastings as the Governor-General of Bengal. He, however, consented to come out in this capacity only on the condition of his receiving overriding authority over his Council. His condition had to be fulfilled and what was denied to Hastings in 1773 was granted to Cornwallis in 1786. An amending Act was passed and the Governor-General was empowered to override the majority of his Council in special cases and act on his own responsibility.*

The constitutional system thus fashioned remained in vogue until the Government of India

* This amendment was strenuously opposed by Edmund Burke. He was of opinion that it would make the Governor-General virtually a tyrant.

Act* 1833 came into full operation (in 1834). For some time the idea was gaining ground that the existence of the three distinct authorities for three different parts of British territory in India was a serious obstacle to moral and material progress. The want of a central government with legislative jurisdiction over all parts of the Company's possessions was keenly felt. Accordingly centralisation became the keynote of the great parliamentary enactment of 1833 for which Macaulay was largely responsible. The superintendence, direction and control of the whole civil and military government of all the Company's territories in India were vested in a Governor-General and Counsellors, to be styled "The Governor-General of India in Council." The separate entity of the provinces was not destroyed altogether. Madras, Bombay and Bengal were to continue as different provinces. Certain territories which were recently conquered but formed so long an integral part of the Bengal Presidency were now constituted into a distinct province by itself (Presidency of Agra). But the authorities of none of these provinces would have any legislative power, the Governor-General in Council being the exclusive legislative authority for British India. The Governments of the provinces would be subordinate authorities charged with the duty of enforcing the laws passed by the Central Government and executing the policy enunciated by it. For this subordinate role, it was not thought necessary that there should be any Council associated with the

* 3 and 4 Will. 4, c. 85.

Governor of a province. But as the Court of Directors was not in favour of summary abolition of these Councils, the Act made them optional. It empowered the Government to abolish these Councils altogether or to retain them with their existing or reduced strength. The Councils of Madras and Bombay were retained but the number of members was reduced from three to two. As for Bengal, the executive authority of this province was vested in the Governor-General of India in Council and consequently no separate Governor in Council was appointed for it. The provision of the Act with regard to the new province of Agra was also not given effect to. It was suspended in 1835 and no Governor in Council was appointed to take charge of it. It was placed under a Lieutenant-Governor who became the head of the executive administration of the province in subordination to the Government of India.

Before 1833 the number of members of the Governor-General's Council was three. A fourth member was now added to this body. It was laid down that three ordinary members would be recruited from among the Company's servants who had put in at least ten years' service in India. The fourth member was not to be one who had been in the service of the Company. His appointment besides would be subject to the approval of the Crown. He was meant for purely legislative business. In fact he was not to sit or vote in the Council except when it met specifically for purposes of making laws. The right to make laws for the whole of Company's territories in India had been exclusively vested in

this body. It was imperative, therefore, that it should be strengthened for legislative purposes by the addition of this legal expert to its membership. The first member appointed in this capacity was Mr. Thomas Babington (afterwards Lord) Macaulay who, as Secretary to the Board of Control, practically piloted the Government of India Bill in the House of Commons in 1833.

This measure remained on the statute book for twenty years and was replaced by the Charter Act* passed in 1853. During the two decades that the Statute of 1833 was in operation it had revealed certain defects. An attempt was now made to remedy them. The authorities of Bombay and Madras were never reconciled to the fact that they might only suggest proposals for legislation which they themselves could not pass. It was their opinion that when a distant authority like the Governor-General in Council was invested with the sole and exclusive right of framing laws for the whole of British India, it was but natural that measures would be passed without much of a reference to the needs of far-off territories. This was a valid criticism and had to be met as squarely as possible in those days. The Act of 1853 provided that for legislative purposes the Council of the Governor-General would be enlarged by the addition of six members. Two of them were to be the Chief Justice and another judge of the Supreme Court of Calcutta, and the remaining four were to be the

* 16 and 17 Vict., c. 95.

civil servants of at least ten years' standing in the establishments of the four provinces of Bengal, Agra, Madras and Bombay. These four were to be nominated by their own Governments and paid also by them. "This was," as the authors of the Montagu-Chemsford Report have pointed out, "the first recognition of the principle of local representation in the Indian legislature."*

While these members were added for legislative purposes, it was thought that the powers and functions of the Legal Member should be increased and his status raised. Up to 1853 he could attend meetings of the Governor-General's Council when it met for legislative purposes alone. He had no access by right to any papers and correspondence not immediately connected with legislation. It was only by courtesy that he might be acquainted with them from time to time. Now, however, he became a full-fledged member of the Executive Council with as much right and authority as any other ordinary member.†

* The Council thus enlarged was no longer identical with the Governor-General's Supreme Council. It came to be known as the Legislative Council of India, its sittings were made public, and it exercised its functions by separate and distinct proceedings which were officially published.

† Lord Dalhousie wanted to open the projected Legislative Council of 1853 to Indians. But his point of view was not accepted by Sir Charles Wood. Dalhousie disappointed in this field appointed Mr. Prosannakumar Tagore "Clerk-Assistant" to the Legislative Council. In reporting this appointment to Wood on the 13th of July, 1854, he observed that Prosannakumar was "a man of ability, learning, wealth and influence." It should be noted that Prosannakumar Tagore was the founder of the Tagore Law Professorship in the Calcutta University. Lee-Warner, *Dalhousie*, Vol. II, p. 232.

Under the Act of 1853 some change was effected in the provincial administration as well. As a result of the Act of 1833 the presidency of Bengal was placed in the hands of the Governor-General of India who was *ex-officio* its executive head. While Councils for Madras and Bombay were retained though with diminished strength, no separate Council for Bengal was appointed. The Governor-General of India, being too busy with all-India affairs, naturally found little time to look to the provincial administration of Bengal. It was arranged, therefore, that one member of his Council would act as his deputy for this purpose and it was he who was practically the head of the Bengal administration. But this arrangement did not prove satisfactory and after twenty years of experiment it had to be abandoned. But it was given up not in favour of a separate Governor in Council but in favour of a Lieutenant-Governor who was appointed to the charge of Bengal for the first time in 1854. Sir Frederick Halliday was Bengal's first Lieutenant-Governor.

The measure passed in 1853 could not long remain effective. Barely four years had elapsed when the Mutiny broke out in 1857. Its suppression in the following year was accompanied by the transfer of the government of British Indian territories from the Company to the British Crown. An Act was passed by the British Parliament known as the Government of India Act 1858,* by which all the rights, privileges and authority which the East

* 21 and 22 Vict., c. 106.

India Company had so long enjoyed became vested in Her Majesty to be exercised in her name. A petition was of course presented to Parliament by the Company praying for the continuance of its regime. It was drawn up by John Stuart Mill who was one of the principal officers under the Court of Directors and bore in every line the impress of his cogent reasoning and clear, felicitous style.* But it was of no avail. Objections to Company's rule were, in fact, multiplying from decade to decade. It had lost the monopoly of its trade in India and China as a result of the legislations of 1813 and 1833. After that it became merely a "patronage bureau." The objections came at last to a head in 1857 when the Indian soldiers broke out into a mutiny. The responsibility for this event was fastened upon the shoulders of the Company due to whose incompetency alone, it was thought, this great calamity had overtaken the Indian Government. The petition was, therefore, brushed aside and India passed under the Crown.

Up till this year the government, as already pointed out, was of dual character. Supreme authority over Indian affairs was shared by the Court of Directors and the Board of Control. The Court had by this time consisted largely of members who, as Company's servants, had acquired not long ago considerable experience of India's conditions and

* The petition is given in full in Keith's *Speeches and Documents in Indian Policy*, Vol. I, pp. 298-319. This document was declared by Earl Grey "to be the ablest state paper that he has ever read, standing as an example of intellectual ability and logical argumentative power for all time." Davidson, *Political Thought in England* (Bentham to J. S. Mill), pp. 161-62.

needs. Now that the Company was being dissociated from Indian administration, and the Court which was the reservoir of so much Indian experience, would have nothing to do with it, it was thought essential that another body consisting of members of equal experience should be associated with the Minister of the Crown responsible for the governance of India. Accordingly the Board of Control was abolished, India was placed under the charge of a new principal Secretary of State, to be known henceforward as the Secretary of State for India, and a Council consisting of fifteen members was constituted to be associated with him. All these fifteen members were to hold their office during good behaviour and like Her Majesty's Judges were to be removable only on an address by the two houses of Parliament. Eight were to be appointed by the Crown and seven by the Court of Directors. The major portion of both the groups would be chosen from among those who had at least ten years of service in India to their credit. In case of a vacancy among the first eight it would be filled by the Crown and in case of one in the latter seven, it would be filled by the Council itself. The expenditure of the revenues of India was subject to the control of the Secretary of State in Council, and no grant could be made without the concurrence of the majority of this Council. Some other duties also were similarly placed under the control of the majority of this body. Ten years later in 1869 the Act was amended* to the effect that the tenure of

* 32 and 33 Vict., c. 97.

office of the members of the Council was changed from one during good behaviour to a term of ten years and the right to fill all the vacancies in this body was vested in the Crown.

CHAPTER II

GROWTH OF THE REPRESENTATIVE SYSTEM

The assumption of the authority over India by the Crown was announced by the Queen's Proclamation on the first of November, 1858. This Proclamation is a document of great historical and constitutional significance. Her Majesty brought it home to the Indian people that her Government would, on no account, interfere with their religious principles and systems of worship and impose its own convictions upon them. None would be favoured and none molested or disquieted by reason of their religious faith or observances. All alike would enjoy the equal and impartial protection of the law. Persons qualified by education, ability and integrity would not, as far as possible, be debarred from any office under the Crown on account of the race or creed to which they might belong.* This was a solemn and noble pronouncement and though not always obeyed in its letter and spirit by those in authority, it has been rightly accepted by the people of this country as the charter of their rights and privileges.

As a result of the Mutiny it was not merely the authority in London that was reconstituted. The central and provincial organs of administration

* Keith, *op. cit.*, Vol. I, pp. 382-86. The contents of Section 87 of the Charter Act of 1833 appear to be more straightforward in this respect.

in India were also reformed within three years of the outbreak of this rebellion. It was in 1861 that the first Indian Councils Act* was passed by the British Parliament at the instance of the Secretary of State, Sir Charles Wood (afterwards Lord Halifax) who as President of the Board of Control had been largely responsible for the Charter Act of 1853 as well. Various reasons now warranted considerable changes in the legislative system of the country. The Legislative Council of India created in 1853 had, in the opinion of the Secretary of State, belied the hopes that had been cherished in regard to this body. Instead of fixing its attention on legislative projects alone, it became, contrary to the intention of its creator, " a sort of debating society or petty parliament." It " constituted itself a body for the redress of grievances and engaged in discussions which led to no practical result." It forgot the purpose for which it was established and refused to confine itself to the mission for which alone it was brought into being. Throughout its short career, it was oblivious of the fact that it was " not an Anglo-Indian House of Commons for the redress of grievances, to refuse supplies and so forth." It was therefore indispensable that its composition should be altered and its powers and functions should be strictly and definitely fixed in the Statute.†

Secondly, even the Legislative Council as constituted in 1853 had failed to give satisfaction to

* 24 and 25 Vict., c. 67.

† The gentleman who annoyed the Government most during the last two years of the Legislative Council constituted under the Act of

the outlying provinces. The Governor-General in Council though transformed in every sense into an all-India authority by the Act of 1833 was still regarded by the Governments of Madras and Bombay as a Bengal establishment. For over half a century it had been associated in the memory of the people with Bengal and although for about three decades it was an all-India institution with all-India functions and powers, the old prejudice against it still persisted. True, the representatives of the four provincial Governments were now on its Council with all their knowledge of local needs and aspirations. But all the same the prejudice lingered and the Legislative Council of the Governor-General was regarded roughly as a Bengal body, and the laws passed by it were taken as measures imposed upon the rest of India by the Government of Bengal. It was felt as a grievance that the Chief Justice and another Judge of the Calcutta Supreme Court were members of this Council while no such privilege was granted to any other province. Now the ground might be flimsy or weighty. But the fact remained

1853 was Sir Barnes Peacock. He had been Law Member from 1852 to 1859 and as such was a tower of strength to the Executive. In 1859 he was appointed the Chief Justice of the Supreme Court, Calcutta (and became in 1861 the first Chief Justice of the Calcutta High Court). As Chief Justice of the Supreme Court of Calcutta, he was an *ex-officio* member of the Legislative Council of India. In this independent position, he showed a strength and will of his own which became very troublesome to the Government. The latter naturally became anxious to oust him from this position of vantage and as the Indian Councils Act of 1861 did not provide for the inclusion of the Chief Justice in the membership of the new Legislative Council, it was "popularly said to be an Act to abolish Sir Barnes Peacock." See Sir George Campbell, *Memoirs of My Indian Career* (Edited by Sir Charles Bernard, 1893), Vol. II, pp. 99-100.

that there was a deep-seated prejudice against the Governor-General's Legislative Council being the exclusive Indian Legislature. Even the reforms inaugurated in 1861 did not do away with the feeling of resentment at the control exercised from Calcutta. Sir George Campbell who rose to be the Lieutenant-Governor of Bengal wrote in his Memoirs that in the sixties the Governments of the two Presidencies of Madras and Bombay were jealous of the authority exercised within their jurisdiction by the Supreme Government. This was surely due to the fact that the old traditions of independence had not yet ceased to be active. In view of this feeling it was necessary that the legislative system should be to some extent decentralised.

Thirdly, the Mutiny had brought home to the British Government one important and glaring fact. It was that the Government of the country had in the existing arrangement of things little opportunity of knowing exactly as to what was passing in the mind of the people whose welfare it was expected to look after. Some representative Indians should be in the Legislative Council to explain the needs and voice forth the aspirations of the people from time to time. If in the previous decade such men were at the Council-Board of the Governor-General, they might have forewarned the Government against the dangers of some of the steps which it had unwarily taken and which had led to the revolt of the Indian army.*

* See the speech made by Sir Charles Wood in the House of Commons on 6th June, 1861 in moving for leave to being in the Indian Councils Bill. Keith, *op. cit.*, Vol. II, pp. 3-20.

On these grounds the reform of the legislative system had become necessary and urgent, and it was introduced by the Indian Councils Act of 1861. It, in the first instance, raised the number of ordinary members of the Governor-General's Executive Council from four to five, three of whom must have ten years of service in India under the Company or the Crown to their credit, and one must be a barrister or a member of the faculty of Advocates of Scotland for at least five years. The Legislative Council of the Governor-General over which he himself would ordinarily preside was to consist of the members of his Executive Council and several other added members whose number was not to be less than six or more than twelve. They would be nominated by the Governor-General for a period of two years. He was required by the statute to see that at least half of these added members were non-official persons, Indian, European or Anglo-Indian. The Legislative Council thus constituted would have no pretensions to the authority and jurisdiction which its predecessor had claimed to exercise. It would meet only for legislative purposes and its members would have the right to speak only on some definite legislative projects. They would have no right to put questions to the members of the Government and demand answers thereto. Nor would they have any authority over the finances of the Government. No financial statement would be laid before them and they would not have the privilege of any discussion upon it.

This Legislative Council of the Governor-General would have authority to make laws which

would operate over all parts of British India. But along with this body would work Legislative Councils in the two Presidencies of Bombay and Madras. These local Legislative Councils would be presided over by the Governors and would consist of the members of their Executive Councils, the Advocate-General and not more than eight, nor less than four, other additional members nominated by the Governor, half of these being non-official persons. Like the Governor-General's Legislative Council these provincial councils also would be concerned only with legislation. They would not have any other privilege of a deliberative body. The laws they would pass would be effective within their own Presidencies alone. With this limitation, however, their jurisdiction was practically concurrent with that of the Indian Legislative Council. Division of power and responsibility between the central and provincial authorities was yet unthinkable. The Indian Legislative Council would have the right to pass laws in every subject provided they did not collide with any parliamentary enactment, and they would be operative in every part of British India. But in case there was no law passed by the Central Legislative Council on a particular subject in a particular presidency, the local council would have the right to frame one.

It was laid down in the statute that the provision for introducing Legislative Councils in the two presidencies would also by proclamation be applied by the Governor-General in Council at his convenience to " the Bengal Division of the Presidency of Fort William," the North-Western Provinces

(Agra) and the Punjab. The number of members to be nominated to the Council would be specified in the Proclamation. In pursuance of Section 44 of the statute, a Legislative Council was set up by Proclamation in Bengal in 1862, in the North-Western Provinces in 1886 and in the Punjab in 1897.

The system thus inaugurated remained in vogue till 1892 when Lord Cross's Indian Councils Act was passed by the British Parliament. It must be admitted that the Councils introduced under the Act of 1861 worked very smoothly and satisfactorily. The Indian members nominated to them were usually persons of requisite ability and integrity. The Act not only did not debar an Indian Prince from the membership of the Legislative Council but it was one of the purposes of this measure to associate him with this body. In the Governor-General's Legislative Council the Maharaja of Patiala served in fact for some time as an added member. The Provincial Councils also could boast of honoured and well known names in the roll of their membership. In the Legislative Council of the province of Bengal which then included Bihar and Orissa, men like Maharaja Jatindra Mohan Tagore, Raja Digambar Mitra, Muhammad Yusuf and Messrs. Harbans Sahai, Kristodas Pal, Bhudeb Mookerji, Anandamohan Bose and Romesh Chandra Dutt served from time to time as members chosen, of course by nomination.

But though the members were efficient, they had not much to do. Their powers were confined

strictly to the framing of laws. A movement was soon started by the intelligentsia for the augmentation of the powers of the Legislative Councils, as well as for the recognition of the principle of election. It was not enough that a good and able man was brought to the Council table. It was equally essential that he should be returned there not by favour of nomination but by the suffrage of his fellow citizens. It 1885 was started the Indian National Congress which immediately began to agitate for the reform and expansion of the Legislative Councils. When Lord Dufferin succeeded Lord Ripon as Viceroy, he was approached for the reform of the legislative councils. He of course looked askance at Congress activities which now began in earnest. But all the same he was convinced of the necessity of extending the powers of these bodies and of recognising the principle of election. He appointed a committee in the deliberations of which Sir George Chesney, Sir Charles Aitchison and Mr. Westland took part.* The deliberations of this Committee constituted the foundation upon which was based the measure which, as passed by the Parliament, became known as the Indian Councils Act, 1892.†

This Act added considerably to the numerical strength of the different Legislative Councils. It provided that the number of additional members of the Governor-General's Council must not be less

* See M. C. Report, pp. 41-44.

† 55 and 56 Vict., c. 14. (For an excellent exposition of the priciples of the Act, see Lord Curzon's speech in the House of Commons on March 28, 1892. Keith, *op. cit.*, Vol. II, pp. 46-47.)

than ten or more than sixteen. In the Presidencies of Madras and Bombay, besides the Advocate-General, the number of additional members in the Councils was not to exceed twenty nor was it to fall below eight. The maximum for Bengal was also fixed at twenty and that for the North-Western Provinces at fifteen. All the additional members, official and non-official, would be nominated no doubt as before. But the Governor-General in Council was empowered to make rules with the approval of the Secretary of State in Council, under which such nomination was to be made by the heads of different Governments. It was in the rules that the principle of election, with regard to some of the seats, was accepted, not of course frankly but in an indirect and roundabout way. The local bodies like the municipalities and the district boards were empowered by turn to name gentlemen for vacant seats in the provincial Legislative Council. The nomination made by them became effective only if and when it was accepted and confirmed by the Governor or the Lieutenant-Governor concerned. In form, therefore, the principle was one of nomination by the head of the province on the advice of these bodies. These latter were to recommend their nominees and it was for the former to accept or reject their recommendation. Though this was the form, in actual practice it amounted to the adoption of the principle of election. Persons recommended by the local bodies were automatically accepted as members of the Legislatures by the Governors or Lieutenant-Governors. The election, if this method may be so named, was mostly of an

indirect kind. It was the local bodies which, by turn, were formed into constituencies. In Madras and Bombay, although these bodies invariably 'elected' lawyers to the exclusion of candidates with other affiliations, the system was not any way disturbed. In Bengal, however, when such tendency became manifest, one seat was transferred to the large landowners. To this extent it may be said that the 'election' was made direct in that province. For the Governor-General's Legislative Council also, "the same principle of election disguised as recommendation was adopted in 1892." Four seats were reserved to be filled by the Governor-General on the recommendation of the non-official members of the four Provincial Legislative Councils.*

An advance was not only made in Indian constitutional development by the indirect acceptance of this principle of election which was till then declared by the Europeans as unsuited to Indian conditions, but in two other aspects also definite improvement was made by the Statute of 1892 on the system inaugurated by the Act of 1861. A financial statement was henceforward to be made on the floor of the Legislative Councils and the members thereof were empowered to give expression to their views upon it. They would not be entitled, of course, to introduce a resolution or to divide the house in respect of any financial discussion. But they would have the right to put questions within

* See M/C. Report, p. 46.

restricted limits to the Government on matters of public interest.

The reforms thus introduced remained effective until 1909 when Lord Morley's Indian Councils Act was passed and the constitution of the Legislative Councils was further improved and their powers were further extended. During the period the Act of 1892 remained on the statute book, the deliberations of the Legislative Councils were enriched by the return to them of many eminent non-official citizens of this country. In the Indian Legislative Council men like the late Gopal Krishna Gokhale, Ashutosh Mookerjee and Rashbehary Ghose made their position felt and their views respected. Of the Legislative Council of Bengal, Surendranath Banerjea was a valued member for four terms 'elected' first by the Corporation of Calcutta and then by the municipal bodies of the Presidency Division. Inspite of the limitations under which the Councils worked, they surely advanced to a considerable extent the capacity of the Indian people for representative government. Their success itself became a justification of the movement outside for a more liberal constitution of these bodies and for the extension of their powers and privileges.

In fact by the time these Councils had been at work for about one decade and a half, correspondence was opened between the Governor-General and the Secretary of State for India. In the general election in England which was held early in 1906 there was a heavy landslide for the Conservatives. The Liberals together with the Labourites constituted an

overwhelming majority in the House of Commons In the new Liberal Cabinet which was constituted with Sir Henry Campbell-Bannerman as the Premier, John Morley was given the portfolio of the India Office. For years he had been one of the chief exponents of liberal and radical thought in England. Harnessed to the India Office, he of course developed a conservative outlook to a surprising degree. But at the start this was not suspected and much was expected of him by the leaders of Indian nationalism. Nor could he set his face completely against all demands for further reforms. However cautious he might try to become, and however slow might be his reaction to the agitation in India for far-reaching changes, he could not absolutely outlive the traditions of his own past career and become stolidly insensible to the changes that had taken place in the public life of India. The Governor-General, Lord Minto, though a nominee of the Conservative Government, was also a statesman of shrewd commonsense. He perceived the changes that the growth of education was every day introducing in the outlook of the Indian people. He also knew it for a fact that the Russo-Japanese War, with its consequent victory of the small Asiatic island over the mighty forces and enormous resources of a first class European power, had quickened the imagination and accelerated the demand for self-rule of the Indian intelligentsia.

Lord Minto "of his own initiative but with the full cognizance and approval of the Secretary of State" appointed a committee of his Executive Council to look into the question of further constitu-

tional reforms for this country.* The Committee consisting of Sir Arundel Arundel, Sir Denzil Ibbetson, Mr. Earle Richards and Mr. Edward Baker studied the problem and made their recommendations. Meanwhile the Viceroy was busily engaged in correspondence with the Secretary of State upon the same subject. The two agreed that further extension of powers of the Legislative Councils should not be long delayed. Accordingly, after the necessary bandying of drafts and memoranda, a bill was introduced in the House of Lords which, as passed by the two houses of Parliament, became known as the Indian Councils Act, 1909.†

It enlarged the size of the Legislative Councils to a considerable extent The number of additional members of the Governor-General's Council which under the Act of 1892 could not exceed sixteen might now be, at the maximum, sixty. Actually the Legislative Council constituted soon after consisted of sixty-eight members including the members of the Executive Council. The size, in other words, was trebled. The provincial Legislative Councils also were similarly enlarged. The maximum number of additional members for the Punjab and Burma was fixed at thirty and for the other provinces at fifty.

The Act frankly accepted the principle of election. The framers of the Act of 1892 had fought shy of it and although in practice they had introduced it in this country they still stopped short of

* See M/C. Report, p. 47.
† 9 Edward 7. c. 4.

calling it by that name. Circumstances had considerably changed since then and the successful experiment of the system of 1892 heartened the Government to provide frankly and unreservedly for the election of a portion of the members of the enlarged Councils. The actual proportion between official and non-official and nominated and elected members was left to be determined by the regulations which the Governor-General in Council was to frame. The rules actually framed by this authority were not welcomed by the nationalist public. They were regarded as rather reactionary. Out of the sixty-eight members of the Indian Legislative Council thirty-two were to be non-officials. So a standing official majority was maintained. Of the thirty-two non-officials again seven were nominated and twenty-five elected in the first term. After the expiry of the first term of the Council, however, the number of elected members was increased by two and that of the non-official nominated group was correspondingly decreased. In the provinces, the non-officials were everywhere given the majority in the Legislative Councils. But elected majority was ensured only in the province of Bengal.

The Act (supplemented by the regulations) provided for the representation of religious, economic and other special interests. Already when it was found in Bengal that under the Statute of 1892 the local bodies were recommending the names usually of lawyers, one seat was taken out of their hands and made over to the large landowners. Again under the same statute the Bengal Chamber of Commerce was given the privilege of recommend-

ing one name for the Legislative Council of the Governor-General. Both the large landowners and the members of a Chamber of Commerce were regarded as constituting important economic interests, and their representation in the new Councils was specifically provided for by rules which the Government of India now framed. The Universities also were similarly given representation in these bodies.

As for the religious interests, the Mahomedans alone succeeded in securing special and separate representation in the Legislative Councils under the new regime. It was in fact they who had started the agitation for such representation when the reforms were first mooted. As early as October, 1906, a Moslem Deputation with H. H. the Aga Khan as the leader waited upon the Viceroy, Lord Minto, and tried to bring home to him the necessity of special and separate representation for their community not only in the legislatures but also in the local bodies and other spheres. They also emphasised the point that the importance of their community should not be judged by its numerical strength but by the part it had played in the past history of the country. Lord Minto was impressed by the arguments of the Deputation and his reply to the address was an ardently sympathetic one. It has in fact been called "the Charter of Islamic Rights." The Viceroy assured the Deputation that the political interest of the Mahomedans would be properly safe-guarded in any administration with which he was associated. He also gave it out as his conviction that any electoral representation which aimed at granting merely a personal en-

franchisement to people regardless of their beliefs and traditions was doomed to mischievous failure. Representation by communities was alone, he seemed to think, suited to Indian conditions.*

Lord Morley, the Secretary of State, could not however in the beginning reconcile his long cherished political ideals to the granting of an absolutely separate representation to the Mahomedans. He had no hesitation in earmarking the quota of Moslem representation in the legislatures but he provided for mixed electoral colleges which would be entrusted with the function of returning the representatives of both the Moslem and other communities. Completely separate Moslem constituencies for the election of Moslem members did not appeal to his imagination and were inconsistent with his democratic beliefs and convictions. But the joint electorate for which he provided was unacceptable to the Indian Mahomedans and to the Government of Lord Minto. He had consequently to drop his own point of view and the system of election he had actually chalked out. It was brought home to him that the difference between Mahomedanism and Hinduism was not a mere difference of articles of religious faith but it was " a difference in life, in traditions, in history, in all the social things as well as articles of belief that constitute a community." He, therefore yielded to the importunate demand for separate representation.† The Moslems of some economic and social standing were given the fran-

* See Report of the Simon Commission, Vol. I, pp. 183-84.

† See Morley's Speech in the House of Lords on 23rd Feb., 1909. Keith, *op. cit.*, Vol. II, pp. 81-98.

chise and came to make up the electoral constituencies which returned their own representatives to the Councils.

So far as the election of Moslem members was concerned, the principle now introduced may be regarded as one of direct representation. That was also the case with the return of representatives by the landowners. Otherwise indirect election was the chief feature of the system now brought into being. This feature had been in vogue since 1892 when the local bodies were given the privilege of 'recommending' names for the Legislative Councils, and it was not disturbed by Lord Morley. For election to the provincial Councils, the District Boards, the Municipalities and the Presidency Corporations were constituted into electoral constituencies. For election to the Indian Legislative Council also, the indirect principle was maintained. It was the non-official members of the Legislative Councils of the provinces who were invested with the right of returning the general elective element to this body.

There was some modification of the executive government also as a result of the reforms of 1909. For some time past correspondence was being carried on between the Viceroy and the Secretary of State as to utility and necessity of having an Indian on the Executive Council of the Governor-General and on that of the provinces. The law did not stand in the way in this respect. Indians were debarred from the executive sanctum not by statute, but by custom. This custom might now be given up and the presence of Indians at the Council-Board might

be ensured without the change of any statute. The suggestion as to the necessity of appointing an Indian to the Governor-General's Executive Council first emanated from Lord Minto. But the suggestion was assailed with equal vehemence in official circles both in England and in India. Excepting the late Sir Edward Baker, all the members of his Council were opposed to the proposal. It was thought rather dangerous that an Indian should be brought into the Council where he would have the opportunity of learning the military and other secrets of administration. In England Lord Ripon who, during his period of Viceroyalty in this country, had given so much evidence of sympathy with the cause of Indian advancement, now ranged himself in opposition to this suggestion. His Majesty the King himself (Edward VII) was emphatically and unequivocally opposed to the proposal.* In the midst of this atmosphere, the Viceroy and the Secretary of State, though depressed and hopeless at times, remained unusually constant in their views in this matter. From the beginning it had been settled that if an Indian was appointed, he would be brought into the Council as Law Member. He would have no department to control and consequently his lack of executive experience would be no bar to his appointment. Besides, Indians had given so much evidence of proficiency in the legal line, that no objection could possibly be taken to their ap-

* See Morley, *Recollections*, Vol. II, pp. 211, 299. The King remonstrated to the last against the proposal. He even thought that the appointment of an Indian to the Executive Council would be disastrous. *cf.*, *Lee*, *Edward VII*, Vol. II.

pointment to such a post. In order to obviate the objection as regards military and other secrets the Viceroy dallied for a while with the suggestion of limiting the Indian Law member to legislative duties alone. He would be present in the Executive Council only when some legislative projects would be under discussion there. The Viceroy, in other words, wanted to go back to the order of things which had prevailed during the days of Macaulay and his immediate successors. But after some examination such a suggestion was found impracticable and it was decided that if an Indian was appointed at all he should be made a full-fledged member.*

The Viceroy and the Secretary of State took courage in both hands and ignoring the opposition which greeted their proposal in India and England from influential quarters decided at last upon the step they had long contemplated. Already in 1907 Morley had taken the bold step of appointing Indians to two of the vacancies in his own Council. One of them was Syed Hussain Bilgrami and the other was Sir K. G. Gupta. Two years later, even before the Indian Councils Act was placed on the statute book, the Gordian knot with regard to Indian appointment to the Viceroy's Executive Council was also cut and the elevation to this body of Mr. S. P. (later Lord) Sinha of the Calcutta High Court Bar was quietly announced. The Indian Councils Act

* See, in this connection, Lady Minto's *Diary* (India, Minto and Morley). It throws a flood of light on the subject of reforms in general and this question in particular.

passed two months later provided for the increase of members of the Executive Councils of the Governors of Madras and Bombay to four. It also empowered the Governor-General in Council to set up by proclamation an Executive Council for the Lieutenant-Governor of Bengal. The same authority was empowered to set up Executive Councils in other provinces as well. But in these latter cases before the proclamation to this effect was made, the proposal was required to be placed before the two Houses of Parliament and if either House objected, the project would fall through. Actually in 1915 when such a project for the United Provinces was placed before the House of Lords it set its face against it and the United Provinces had on that account to forego, for the next few years, the privilege of Council Government which some of their neighbours happened to enjoy. Now although increase of members in some Executive Councils was provided for and such Executive Councils were for the first time established in other provinces,* it was not required by statute that any member of these bodies would be Indian. But as it has already been pointed out, while the statute did not provide specifically for the appointment of Indian members, it also did not bar out such appointment. And as in the case of the Governor-General's Executive Council, so also in the case of

* When under the Act of 1909 an Executive Council was introduced in the same year in Bengal, this province consisted of Western Bengal and Bihar and Orissa. In 1912 Bengal Presidency was constituted and Bihar and Orissa were separated from it. The new Province of Bihar and Orissa accustomed as it was to Council-Government was given one in this year though three years later the proposal for the U. P. was rejected.

the Provincial Executive Councils, a practice was now inaugurated that they would include one Indian member. It was in pursuance of this principle that Raja Kishorilal Goswami was appointed a member of the Executive Council of Bengal.

The appointment of Indian members to the Executive Councils was a reform of far-reaching importance. It was surely a most significant landmark in the constitutional development of this country. The Executive Councils were the strongholds which had been hitherto guarded most carefully against the intrusion of the children of the soil. A breach was, however, now effected in the citadels. For the time being the breach was not a large one and only one man could somehow glide through it. But it was inevitable that it would widen as time rolled on. This reform, so important in character, did not indeed flow from the Indian Councils Act of 1909 but it was the outcome of the same liberal spirit as had inspired that parliamentary enactment. It should therefore be taken as part and parcel of the reforms of 1909 which bear the names of their authors, Lords Morley and Minto.

The constitution set up under the Act of 1909 remained in operation barely for a period of eleven years. It was replaced early in 1921 by the Montagu-Chelmsford reforms. During this short period it associated the Indian people more intimately with the administration of their country and advanced the cause of popular government to a great extent. But admittedly it had its defects. Neither Lord Minto nor Lord Morley had in view the introduction of Parliamentary government in India.

" If it could be said that this chapter of reforms led directly or indirectly to the establishment of a parliamentary system in India." observed Lord Morley, " I, for one, would have nothing at all to do with it." In fact, the administration of the country was still to be conducted in full responsibility to Whitehall. The provincial authorities were to run the government in subodination to the Governor-General in Council and the latter body would be responsible, for every thing that was done or left undone, to the British Parliament through the Secretary of State. The centre of gravity had not yet been shifted to India. The Legislative Councils might have been enlarged, the right of their members to move resolutions, ask questions, and introduce bills might have been acknowledged but the government would be conducted not according to the lines they would dictate, not in responsibility to the opinion they would express but in consonance with the views that the British Parliament would express through the Secretary of State. Under these circumstances, when nothing that the members of the Councils might say was to affect the fundamental policy of the Government, it was natural and inevitable that non-official members would on occasions act irresponsibly. There was no incentive for them to speak and act with due sense of responsibility. The authors of the Report on Indian Constitutional Reforms, 1918, were definitely of opinion that by the Act of 1909 the old system of benevolent despotism was hampered to a great extent by the criticism of the Councils but at the same time the new principle of responsible government was not intro-

duced. So the arrangement of 1909 had neither the efficiency of the undiluted and unhampered old system nor the advantage of popular control of the new. "Responsibility is the savour of popular government and that savour the present councils wholly lack."*

Secondly, the political education which elections to the legislatures entail, as a rule, among the people was not very much engendered under the Morley-Minto arrangement. It was only in case of the Mahomedans and the landowners that election was direct. Otherwise it was of the indirect kind. Members were returned not by the primary voters but by the district boards or municipalities. It was true that only for ten years this system was in operation and consequently, the evils which are usually associated with indirect election of this kind, could not be manifest in this country. But the fact remains that elected members of the legislatures had no intimate association with the primary voters who had little interest in their return. The people having nothing to do with the elections, no address was made to them, no programme was placed before them. They were not to scan the antecedents of the candidates, to understand their different view-points and to make ultimately a choice between them. They had in fact no opportunity of political education.

Thirdly, the principle of separate communal representation which the Act of 1909 had introduced proved to be inconsistent with nationalism which it

* Report, p. 52.

had been the object of the leaders of all schools of thought to foster. For the time being it was only the Mahomedans who had profited by the arrangement but soon other religious groups would also come forward for the special and separate representation which had been granted to one community. The introduction of representative institutions in this country was expected to foster more and more the camaraderie between man and man irrespective of religious and communal affiliations. But this hope was belied. When election was to be run by compartments, when voters of one community would not meet those of another on the same platform, there was not only no chance of unity being achieved but there was the positive risk of their being drawn further apart still.

CHAPTER III

INTRODUCTION OF THE MONTAGU-CHELMSFORD CONSTITUTION

The constitutional development which was begun in 1861 reached its logical culmination in the Indian Councils Act of 1909. The principle underlying the system was that while the administration would remain vested in the Governor-General in Council and his agents in the provinces, who would conduct it in full responsibility to Whitehall, the representatives of the people of the country would be called in for the expression of their views and opinions from time to time. The scope of such expression of opinions became wider as one Indian Councils Act after another was passed until under the arrangement of 1909 the added members of the Councils were given the privilege of moving resolutions upon the budget and other matters of public importance and of dividing the Council upon them. As the responsibility still fully and exclusively attached to the executive, the Legislative Councils were but advisory bodies and as such they were incapable of further development. If representative institutions were further to grow beyond these limits, it was imperative that the fundamental principle of government in this country should be changed. The centre of gravity should be shifted from the British

to the Indian electorate. The ultimate responsibility for the administration of the country instead of remaining vested in the former must be transferred to the latter. The executive in India instead of discharging its duties in responsibility to the representatives of the British people must act in accordance with Indian public opinion and in responsibility to the representatives of the Indian electorate.

Within five years of the introduction of the Morley-Minto Reforms, the War broke out and this changed the political situation in India almost beyond recognition. It quickened the political consciousness of the people, considerably added to their political education and largely augmented their demand for political responsibility. By 1915 the Indian publicists were busy chalking out schemes of constitutional reform to be introduced in India on the conclusion of the War. In this year, the late Mr. G. K. Gokhale who had at one time pinned much faith to the Morley-Minto arrangement but had become disappointed in it as he watched it in operation for some time, submitted a scheme to Lord Willingdon, then Governor of Bombay. This document has now become well known as the last political testament of Gokhale as he died not long after its submission. It was not published till 1917 and was on that account possibly unknown to the nineteen members of the Indian Legislative Council who signed a memorandum of their own in October 1916 on post-war reforms, and to the members of the National Congress and the Moslem League who chalked out a joint scheme two months later.

Neither Mr. Gokhale nor the nineteen go-ahead members of the Imperial Legislative Council nor the members of the Congress and the League fully appreciated the fact that a fundamental change in the principle of administration in India was necessary if the government of the country was to be further reformed and liberalised.* They still thought it possible to build on to the existing framework without any change in its basic arrangement.

In one aspect of course they recommended changes in a line that were logical. But in this recommendation they could not claim much originality. Already in 1911, the Government of Lord Hardinge had sent out a Despatch to the Secretary of State suggesting modification of the partition of Bengal and the transfer of the capital from Calcutta to Delhi. It foreshadowed also the institution of provincial autonomy in this country. Further constitutional changes would be necessary and greater power would require to be transferred to Indian hands. If such transfer was to be made consistent with the maintenance of the authority of the Governor-General in Council, the Despatch suggested that some rough kind of provincial autonomy should be granted and in the provincial sphere the Indian representatives should have greater and wider control over the affairs of the Government. Mr. Gokhale took the cue from this Despatch and proposed that some functions should be definitely

* Gokhale's Testament, nineteen Members' memorandum and the Congress-League Scheme are included in Keith. *op. cit.*, Vol. II, pp. 111-131.

transferred to the provinces and some independent sources of income also should similarly be handed over to them. The control exercised over the provinces so long by the Government of India and the Secretary of State should now be replaced by that of the local Legislative Councils. But although the control of the representatives of the people would now be substituted to this extent, the executive in the provinces would remain unchanged in form. There would be a Governor in Council in every province. But of the six members constituting the Council, three should be Indians. The Governor in Council would of course continue to be appointed as before by the Secretary of State and certainly would remain responsible to him. In other words the Legislative Councils which would exercise real power over the legislation and the purse would predominantly consist of the elected representatives of the people and would consequently be responsible to them. The executive, however, would be appointed by the mouthpiece of the British people and would owe responsibility to the same functionary. It is difficult to see as to how this arrangement would have worked.

The Congress-League scheme which was largely based upon the memorandum of the nineteen members of the Indian Legislative Council was no doubt more go-ahead than that of Mr. Gokhale but did not involve any new principle regarding the relations between the executive and the legislature. The Congress-League scheme did not leave the Government of India untouched as Mr. Gokhale's Testament had done. It provided for the same

changes here as in the provincial sphere. In both the central and provincial Executive Councils it suggested that half the members should be Indians and these Indian members should be elected by the respective Legislative Councils. The European members, however, would continue to be appointed by, and responsible to, the Secretary of State. So some members of the same Council would owe their office to the local legislature and some to the Secretary of State in London. As if this arrangement was not sufficiently illogical and confusing it was suggested further that although the Indian members would be elected by the local legislature they would be responsible not to it but to the Secretary of State. This complexity in the Indian proposals was due to the vain attempt to build on, as pointed out already, to the old structure. A departure in principle from the old arrangement was necessary but the leaders of Indian thought remained clinging to the old moorings.

However complex and unworkable might be the schemes prepared by the Indian leaders, the British Government could not be insensible to the spirit which had inspired them. That there was now a positive and widespread demand for the transfer of power from British to Indian hands could not any longer be denied, and it was thought necessary by His Majesty's Cabinet to make a pronouncement without further delay as to the goal of British policy in India and as to the immediate steps that it would take for liberalising the Indian administration. Accordingly Mr. Edwin Montagu who had been sometime earlier an Under Secretary of State for

India holding very advanced views was appointed, in the middle of the year 1917, the Secretary of State for India in succession to Mr. Austen Chamberlain who resigned his office in view of the scandal of the Mesopotamian campaign.

Mr. Montagu did not allow grass to grow under his feet. Soon after his accession to office he decided to make the desired pronouncement. On the 20th of August, 1917, in reply to a question which was put to him in the House of Commons he made the famous declaration that " the policy of His Majesty's Government, with which the Government of India are in complete accord, is that of increasing the association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire." Substantial steps in this direction, he observed, should be taken as soon as possible. To this end it was necessary that there should be free and informal exchange of opinions between those in authority at home and in India. Already when Mr. Chamberlain was the Secretary of State the Government of India had invited him to pay a visit to this country. This invitation was now extended to Mr. Montagu who decided to accept the invitation and proceed to India.

He reached India early in November, 1917, accompanied by Lord Donoughmore, Mr. Charles Roberts, Sir William Duke and Mr. B. N. Basu. Immediately along with the members of his delegation he engaged himself in receiving addresses from,

and discussing the lines of progress with, the members of the different deputations which waited upon him. For months such discussions continued and at last ideas seemed to settle down as to the scope of immediate reforms that would be introduced. If Montagu's Diary* is a reliable document of what transpired during these months, it has to be assumed that the Viceroy, Lord Chelmsford, played a timid and insignificant part in the framing of the proposals which were ultimately embodied in the Report that bears their joint signature. He was more concerned with questions of etiquette and precedence than with the subject-matter of discussion. He was all the time vacillating and could seldom make up his mind on any important matter. Mr. Montagu at least carried home the impression that instead of facilitating, Lord Chelmsford had obstructed the progress of business. Any way, at last, the lines were settled and Mr. (later Sir) William Marris of the Indian Civil Service who later on became the Governor of the United Provinces was commissioned with the duty of drafting the Report. He was diffident at the start on account of the fact that he did not agree to many of the proposals that the report would contain. He forgot that as a civil servant it was not expected of him to be punctilious about his own views. What he was expected to do was to embody as ably as possible in the report the opinions and views which were dictated to him. It should be pointed out that his scruples were at last

* His Indian Diary.

overcome and the report which has come down to us from his pen is a masterpiece of official drafting.

The Report on Indian Constitutional Reforms, commonly known as the Montagu-Chelmsford Report, was published in April, 1918. Apart from the constitutional proposals which it contained, it suggested the appointment of special committees to go into the question of franchise for the Legislative Councils, into the question of division of functions between the Central and Provincial Governments and into the question of changes that would be required in the home administration of Indian affairs. By the middle of 1919 all the three committees, the first two being presided over by Lord Southborough and the last by Lord Crewe, finished their labours and submitted their reports.

The Government of India Bill based upon the proposals of Mr. Montagu and Lord Chelmsford was introduced in the House of Commons on the 2nd of June, 1919. After the second reading three days later, the bill was referred to a Joint Committee of the two Houses with Lord Selborne as the Chairman. The Committee held public sittings in July and August. Many deputations had gone to England from this country to place their views upon the provisions of the Bill before the Committee. First and foremost among them was the Moderate Deputation which was led by the late Sir Surendra Nath Banerjea and which consisted among others of Mr. Srinivasan Sastri and Mr. C. Y. Chintamoni. The Congress Deputation included Mr. V. J. Patel and Mr. Madhav Rao, and the Moslem League Deputation was led by Mr. M. A. Jinnah. Among others

who appeared before the Committee in their individual capacity were His Highness the Aga Khan, Sir Michael Sadler, Sir C. P. Ramaswamy Iyer, Sir Atul Chatterji and Sir Frank Sly. The Committee after listening to these witnesses sat in private and altered many of the provisions of the Bill. Its report was submitted in the middle of November and the amended Bill passed rapidly through the Houses and received the Royal assent before Christmas. On the 23rd of December the passing of the new Act was announced by Royal Proclamation in which the King-Emperor characterised it as a measure of historic importance.* The next few months had to be spent in preparing for the elections to the new legislatures, which could not be held before November, 1920, and it was not till early in 1921 that the new Act was in full operation.

Keith, *op. cit.*, Vol. II, pp. 327 332.

CHAPTER IV

CENTRAL EXECUTIVE UNDER THE ACT OF 1919

It cannot be said of course by any stretch of imagination that the Government of India Act, 1919, made the system of administration in British India a federal one. The authority of the Government of India over the whole country was still very largely maintained and this authority was to be exercised in responsibility to Whitehall. But although the arrangement now set up was not a federal one, a half way house to federal system was certainly created. As far as possible a clear division of functions between the Central and the Provincial Governments was made. The former was invested with duties in respect of defence, political and external affairs, the main railways and other strategic communications, posts and telegraph, currency and coinage, public debt, commerce, civil and criminal law and procedure, ecclesiastical administration, the All-India Services, certain institutions of research and investigation and all other subjects not enumerated as provincial functions. To the latter were handed over duties in connection with the maintenance of internal law and order, administration of justice and jails, irrigation, forests, inspection of factories, supervision of labour questions, famine relief, land revenue administration, local self-government, education, medical administration, sanitation and public health, public works,

agriculture, development of industries, excise and co-operative societies.

The provincial functions again were divided into two categories.* 'The first group which included administration of police, justice and prisons, irrigation, forests (except in two provinces), famine relief, land revenue administration and inspection of factories was declared to be reserved.' The second group including local self-government, education (excepting European education), medical relief, sanitation and public health, public works, agriculture, excise, co-operative societies and development of industries was earmarked as 'transferred.' The reserved departments would be in charge of the Governor in Council. Some control over them was vested in the provincial legislatures no doubt. But the final authority over them was assigned to the Governor and his Executive Council and they were to exercise this authority in subordination to the Government of India and the Secretary of State. So far therefore as the devolution of functions to the provinces in this field was concerned, it might be normally real but still in cases of necessity the control from Whitehall and Simla-Delhi was unquestioned. The transferred departments were to be administered by the Governor acting with his

* Originally the idea of bifurcating provincial functions into two groups and making the administration of one such group responsible to the local legislature was formulated by Mr. Lionel Curtis who along with Mr. Philip Kerr (now Lord Lothian) was one of the promoters of the "Round Table" movement. He had been in South Africa and formed the friendship of Mr. (later Sir) William Marris who also was a Round Tabler. He came to India in Feb., 1917. For his proposals see his *Dyarchy*. (Oxford, Clarendon Press.)

Ministers. The Governor was required to act usually on the advice tendered by these Ministers who were to hold their office in responsibility to the local Legislative Councils. So it may be said that for the administration of the transferred departments, practically final responsibility rested with the provincial legislatures. To this extent it may therefore be said that provincial autonomy which had been envisaged in the Hardinge Despatch of 1911 and which had been so ardently supported and advocated both by Mr. Gokhale and by the members of the National Congress and the Moslem League was granted to the people of British India. The autonomy granted in this 'transferred' sphere to the provinces may be taken as the beginning of federalism towards which the Indian constitution was henceforward to gravitate.

As in the functions of government so also in regard to the sources of income and the heads of revenue, an attempt was made to delimit the spheres of the Central and the Provincial Governments. For fifty years past the tendency had been towards this delimitation. Before 1871 the income and expenditure were undivided. The purse was one and the responsibility was vested in one authority. In this year the Government of Lord Mayo appreciated the necessity of delegating financial powers, and introduced the principle of handing over to the Provincial Governments a sum of money which they would require for the administration of certain duties imposed upon them. Ten years later the principle was extended and henceforward instead of a definite sum, some sources of income were every

five years made over to these authorities. The arrangement inaugurated in 1882 was revised quinquennially until in 1904 it was made quasi-permanent and in 1912 permanent.

This allocation of the sources of revenue required drastic revision before the inauguration of the Montagu-Chelmsford Reforms in view of the wider responsibility that would be vested in the Provincial Governments in the new regime. Accordingly a committee was appointed with Lord Meston, who had been Lieutenant-Governor of the United Provinces and the Finance Member of the Governor-General's Executive Council as the chairman. The arrangement which was set up by this committee now goes by the name of Meston Award. As far as possible divided heads of revenue were avoided by Lord Meston and his colleagues. In order that the spheres of taxation between the Provincial and the Central Governments might be distinct and separate and the relations between the two authorities clear and definite, certain sources of income were assigned to the Central Government and certain other sources to the Provincial Governments. Land Revenue and income from Excise, Irrigation, Forests, Judicial Stamps and Registration Fees were made provincial. Customs duty, Income Tax, revenue from Railways, Post and Telegraph, Salt and Opium were earmarked for the Central Government. Of course divided heads could not altogether be avoided and it was laid down that under certain conditions a portion of the yield from the Income Tax would be given to provinces like Bombay and Bengal. This delimitation of

financial boundaries between the Central and the Provincial Governments also quickened the growth of the federal idea in this country and was surely a stepping stone to the complete federal system that would be set up later on.

In the declaration of August 20, 1917 which was bodily introduced in the Act of 1919 as its preamble, the Secretary of State had referred to responsible government as the aim and object of British policy in India. But actually speaking it was only for the administration of the transferred departments in the provinces that this principle was accepted. The rest of the provincial and all the central functions would continue to be discharged not in responsibility to the Indian legislatures and electorate but in subordination to British Parliament. The controlling and supervising authority which Whitehall had exercised so long remained therefore practically unimpaired except in a small and limited sphere. In fact only with regard to the provincial transferred departments this authority was considerably though not wholly withdrawn.

The question arose as to how this responsibility of the British Parliament would be henceforward discharged. Up till 1919, the Government of India had acted in full responsibility to the Secretary of State for India in Council. Indian public opinion however had for a long time past demanded the abolition of the Secretary of State's Council. This body was regarded as the stronghold of obscurantism and reactionarism. Out of the maximum number of fourteen members of this Council the

law provided that as many as nine must have served or resided in British India for at least ten years. Some British Civilians and Anglo-Indian (old style) merchants on retiring from their Indian career had thus an opportunity of becoming members of this body. Reactionaries as they mostly were they set their face definitely against all measures that smacked of the slightest transfer of power from British to Indian hands. Mr. Edwin Montagu, before his elevation to the office of the Secretary of State but with the experience of an Under Secretary of State for India to his credit, once pointed out in the House of Commons that "the statutory organisation of the India Office produces an apotheosis of circumlocution and red-tape beyond the dreams of any ordinary citizen."

It has been pointed out that a committee was appointed with Lord Crewe, who had been Secretary of State for India in succession to Lord Morley, as the chairman and with Professor A. B. Keith and Mr. B. N. Basu among others as members to report on the organisation of the Home Administration of India. The majority of the committee was in favour of abolishing the Council of the Secretary of State and instituting instead a body of "advisers." The difference however between the two would have been practically the difference between tweedledum and tweedledee. Mr. B. N. Basu was against the proposal and appended a note of dissent. Professor Keith also dissented from the majority standpoint. The Joint Select Committee set its face against the proposal and amended the Bill in favour of retaining the Council though with reduced membership.

Section 3 of the Government of India Act, 1919 provided that the Council of the Secretary of State would consist of not less than eight and not more than twelve members, half of them having requisite Indian experience to their credit. So excepting for the slight reduction of membership and for some change in the conditions of appointment to it, the Council continued to exist as before and all the time it served only as a clog in the wheel of the Home Administration of India.

Before the passing of the Government of India Act, 1919, the salary of the Secretary of State and his deputies was charged on the Indian revenues. Under the new regime it was placed on the British estimates. Apart from a slight relief to the Indian tax-payer this change had the advantage of Parliamentary attention being focussed to a greater degree upon Indian affairs. The third change that was made in the machinery of Indian administration at London consisted in the withdrawal of the agency functions from the India Office and their transference to a new functionary to be known as the High Commissioner for India. He would be appointed by the Government of India and would act as its agent in London as to the purchase of stores, the supervision of Indian students and looking to the work of the Indian Trade Commissioner. With these changes of a minor character, the authority at Whitehall for controlling and supervising the affairs of India remained as constituted and as endowed with power as before.

The executive authority of the Central Government was vested in the Governor-General in Council.

As pointed out already, this executive was not to be responsible to, and removable by, the Legislature that was set up at the centre. It remained consequently responsible as before to Whitehall. The Act did not fix the period for which the Governor-General or the members of his Executive Council were to be appointed. The period was fixed by convention at five years. Since the days that Warren Hastings and his colleagues at the Council Board were appointed for this period by the Parliament in 1773, this practice has continued inspite of the silence of the later statutes as to the period of office. Under the Act the Governor-General and the members of his Council were to be appointed "by His Majesty by Warrant under the Royal Sign Manual."*

But though under the law they are to be appointed in the same way, actually the procedure is different. The members of the Council are appointed by the Secretary of State usually on the recommendation of the Governor-General. If in case a member is chosen from among British lawyers or from among British (Home) Civil Servants, the Secretary of State acts on his own initiative. But when they are chosen either from the Indian Civil Service or from Indian public life, the Governor-General usually exercises an effective voice in the appointment. Now and again it has been found no doubt that the Secretary of State overrides the recommendations of the Viceroy and makes his own appointments. This happened especially during

* Secs. 84 and 86.

Lord Morley's tenure of office as the Secretary of State and on this score some bad blood was created between him and Lord Minto, the Governor-General. But such arrogation of responsibility entirely to the Secretary of State was possibly an exception and as a rule appointments are made after due correspondence between the two.

The scope of their choice is of course limited by some conditions imposed both by statute and convention. One of the members of the Council whose number by the way is not fixed by statute must be a barrister or an advocate of at least ten years' standing. Three others again under the statute must be persons who have been for at least ten years in the service of the Crown in India. For ten years since 1909 again a convention was created that one of the members must be an Indian. Since 1921 this practice has been further extended and three of the members have been invariably chosen from among qualified Indians. It has been pointed out elsewhere that when in 1909 it was decided to appoint an Indian to the Council, it was contemplated that he would be invariably chosen for the office of the Law Member. But when on the expiry of the term of office of Sir Ali Imam the late Sir Sankaran Nair was chosen to be a member of the Viceroy's Executive Council, he was given the portfolio of Education and Sir George Lowndes was appointed to be the Law Member. But since the retirement of this gentleman in 1920 the office of the Law Member has been invariably filled by some eminent Indian Lawyer.

Another principle which has been observed in

the appointment of Indians to the Council is to the effect that one of them must be a member of the Services. Four Indians with this qualification have so far been appointed to permanent vacancies in the Executive Council. Three of them were recruited from the Indian Civil Service and one from the Finance Department. Another practice which has similarly hardened into a convention in connection with the choice of Indians is that one of the three must be invariably a Mahomedan. When the Moslem publicists got scent of the fact that Lord Minto and Lord Morley were contemplating the appointment of an Indian to the Viceroy's Executive Council, they became considerably perturbed over the matter. They seemed to be of opinion that either no Indian should be appointed in this capacity or two should be so appointed, one being a Moslem. They actually went on a deputation to the Secretary of State and urged the appointment of two members of whom one must be of their community. Lord Morley of course could not accept their suggestion but it was practically decided that so long as there would be only one Indian appointment it would go to the Hindus and Moslems by rotation. Actually when Mr. S. P. (later Lord) Sinha resigned his membership of the Council after a short tenure of office, he was succeeded by Sir Ali Imam and the latter by Sir Sankaran Nair. This being the practice when one Indian alone was included in the Council, it could be taken for granted that when more than one seat would be filled by Indians, one of them at least would be reserved for a Moslem.

There is yet another practice followed not uniformly but very frequently in the choice of members to the Executive Council. This is to recruit Indian Finance Members usually from the British Treasury. The practice began with the choice of James Wilson soon after the Mutiny for the organisation of the finances of this country. Sir Charles Trevelyan who became Finance Member some time later once belonged to the Indian Civil Service no doubt but had early gone over to the Home Civil Service as Assistant Secretary to the Treasury. His appointment also was therefore one from outside. Coming to our own days we find that during the reformed regime, the first Finance Member was chosen from the Indian Civil Service in the person of Sir Malcolm (now Lord) Hailey. But soon he was transferred to the Home Department and the Secretary of State reverted to the practice of recruiting the Finance Member from the British Treasury. Since then this practice has been uniform and continuous. It has of course created some heart-burning in the members of the Indian Civil Service. But it is now taken for granted that the Indian career does not ensure that outlook, that knowledge and experience of high finance which the Finance Member should be expected to possess.

The Governor-General has no hand in the appointment of his successor. It is not usually open to him to suggest to the Secretary of State any name for this purpose. Nor is the appointment of the Governor-General made only on the recommendation of the Secretary of State. The post is too important to be filled merely on the nomination

of the departmental Minister. The selection is usually made by the Premier in consultation with the Secretary of State and possibly with his other colleagues in the Cabinet. It is now common knowledge that the late Lord Inchcape was asked by Lord Morley as to whether he would accept the Viceregal appointment in India on the retirement of Lord Minto and on his replying favourably he was in so many words promised that important office. But Mr. Asquith (later Lord Oxford and Asquith) who was then the Premier turned down the proposal on the reasonable ground of Lord Inchcape's wide connection with commerce and industry of the country to the Governor-Generalship of which his appointment was being proposed. This illustrates the fact that the Secretary of State on his own account cannot make the Viceregal appointment. But if he chooses, he may surely baulk a proposal. Lord Kitchener for instance while in this country as the Commander-in-Chief cherished the ambition of being promoted to the Viceregal throne. He looked forward to this elevation with an eagerness that was almost pathetic. But Lord Morley would have none of him in this office. Every inch a military man, he as Viceroy was expected to be a square peg in a round hole. He was of course disappointed in his ambition.

Every member of the Executive Council is in charge of one or more departments. The Governor-General himself apart from his being the head of the Government and the supervisor of all the departments is directly in charge of the Foreign and Political Departments. One member is in

charge of the Home Department, another has been given the portfolio of Finance, the third has been placed in control of Commerce, the fourth of Industries and Labour, the fifth of Education, Health and Lands, the sixth is the Law Member and the seventh is the Commander-in-Chief. This portfolio system was inaugurated by Lord Canning after the passing of the Indian Councils Act, 1861. Up till this year there was no such organisation. The policy of the Government was framed by the Governor-General in Council and the administration was run on the responsibility of the same authority. The different public questions that demanded the attention of the Government were placed before the members and discussed by them either orally at the Council Table or in their written minutes which were many in number and elaborate in character. After considerable discussion of this nature some decisions would be arrived at. So every decision would emanate from the Council. But the members of this body had nothing to do with the departments which were to give effect to these decisions. Every department was placed in charge of a Secretary who was in direct touch with the Governor-General and took his orders from him. It came to this in other words that the decisions were normally made by the Council but the departments were run by the Governor-General with the assistance of the Secretaries.

The arrangement was analogous to the management of an industrial concern whose policy is framed by the Board of Directors but is operated by its Chairman. Under this system the members who

had nothing else to do were apt to talk too much and to write minutes, too many in number and too inordinate in length. The Secretaries again who were in direct touch with the Governor-General, were responsible to him alone and were authorised to be present at the meetings of the Council when the affairs of their departments were in discussion, came to exercise under this arrangement too much of power and influence. Sir Charles (later Lord) Metcalfe who was a member of the Council from 1827 to 1834 used to complain that under this arrangement the members of the Council who were invested with the responsibility of governing the country had in fact little authority while the Secretaries were too powerful and too overbearing.*

By the time that Canning became the head of the Indian Administration, the system had become almost intolerable and cried for an immediate change. The Indian Councils Act empowered the Governor-General to make rules and issue orders from time to time for an efficient transaction of business in the Council. Taking advantage of this section, Lord Canning made necessary changes in the procedure of business. Henceforward every member of the Council was placed in charge of one or two portfolios and the Secretary or Secretaries to such departments were to work under his control. Of course the Secretaries would not be completely under his thumb. As the Government of India was responsible to Whitehall and as the Governor-

* J. W. Kaye, *The Life and Correspondence of Charles Lord Metcalfe* (1854), Vol. I, p. 475.

General who was the head of the Administration had a special responsibility of his own, the Secretaries though subordinate to the Members were given an important voice in the management of their departments. In case the views of the Members and those of their departmental Secretaries differed, the matters had to be brought to the notice of the Governor-General.* If they were of minor importance, the side to which he would incline would prevail. In matters of greater importance, however, they were to be placed before the Council and its decisions would be final. Of course if safety, tranquillity and good government of the country were involved, the Governor-General had authority to override the decision of the Council. The departmental system thus introduced by Canning has continued ever since, with of course the reshuffling of portfolios from time to time.

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* See Sir John Strachey, *India*, 1911, pp. 62-69.

CHAPTER V

Central Legislature under the Act of 1919

The Indian Legislature was given a new status under the Act of 1919.* Hitherto the making of laws was the function of the Governor-General in Council. Only "for the better exercise" of this function, some other members were to be added to his Council, at first wholly by nomination and then by both election and nomination. But under the arrangement of 1919 a definitely separate legislature was set up consisting of the Governor-General and two chambers, the Council of State and the Legislative Assembly. The members of the Executive Council would be members of one house or the other no doubt but only on nomination by the Governor-General. The Council of State which is the upper chamber consists in all of sixty members, twenty-six of them being nominated by the Governor-General and thirty-four elected. Of the twenty-six nominated, as many as nineteen are officials.†

Of the elected group again twenty are returned by non-Mahomedan electorates, three by European Chambers of Commerce, one is a Sikh returned by the Sikh electorate and ten are Mahomedans elected by Moslem constituencies. The principle of the representation of interests and communities as intro-

* Sec. 63.

† Under Sec. 63A (I), not more than 20 can be officials.

duced by the Indian Councils Act of 1909 was regarded by the members of the Congress and some other public bodies as inconsistent with national and democratic ideals. It was thought that the operation of such a principle would be subversive of nationalism in the country. But the members of the Congress, eager for progressive changes in the constitution of the country, found it also necessary to conciliate the Moslem publicists. The latter were unwilling to support the popular demand for constitutional changes unless the principle of separate and adequate communal representation was accepted by the Hindu leaders. The members of the National Congress now regarded it discreet to concede this demand and in the Congress-League scheme which was chalked out in December, 1916, provision was made for adequate and separate Moslem representation.*

Mr. Montagu and Lord Chelmsford in their Report considered communal electorates as opposed to the teaching of history, as perpetuating class divisions and " as a very serious hindrance to the development of the self-governing principle."† But they did not want all the same to disturb the principle which had already been introduced in the country under the Act of 1909 and which had now been accepted by the leaders of the two major communities. So the Government of India Act, 1919, provided for communal representation in the Council of State, in the Legislative Assembly and also in the different provincial legislatures.

* Keith, *op. cit.*, Vol. II, p. 125.
† Pp. 148-49.

The Legislative Assembly is the lower and the more popular chamber of the Central Legislature. It consists of one hundred and forty-five members of whom one hundred and five are elected and the rest are nominated. Of the nominated group again twenty-five are officials.* As in the Council of State, so in this body also representation of interests and communities is the underlying principle accepted in the Act. Twenty of the elected members are returned by the landholders, Europeans and the Chambers of Commerce and thirty-two of them by Moslem and Sikh constituencies.

Elections both to the upper and the lower houses are direct. It was not thought wise and proper to continue the indirect principle which had been worked for eleven years under the Morley-Minto arrangement. It was abandoned and the principle of direct representation was now substituted for it. Social, communal and general (non-Mahomedan) constituencies have been carved out to this end. High property qualification has been made the main basis of franchise. So far as election to the Council of State is concerned, such qualification is especially high and only a select group of people has been given the right to vote. The law lays down that those who are assessed to income-tax on an annual income of from Rs. 10,000 to 20,000 and those who pay land revenue from Rs. 750 to Rs. 5,000 will have the minimum qualification for the vote. This has made it possible for the practice

* Sec. 63B(2). Under this section at least five-sevenths of the total membership have to be elected and one-third of the rest has to be officials.

to vary from province to province, and from division to division and community to community in the same province. In Bengal qualifications are lower in the Dacca Division than in the Burdwan Division and for the Moslems the qualifications are far lower than they are in the case of the Hindus. Besides this high property qualification, public work of a specified character also qualifies an individual for the franchise. A gentleman who for instance was ever a member of a legislative council or held ever the office of a chairman or vice-chairman of a district board or municipality has a right to vote. The qualifications for the voters of the Legislative Assembly are also determined on the basis of property and income. These qualifications of course vary from part to part of the country but the lowest are the payment of municipal tax to the extent of Rs. 15 per annum, the occupation or ownership of a house whose annual rental value is Rs. 180, assessment to income-tax on an annual income of Rs. 2,000 and the payment of land revenue to the extent of Rs. 50 per annum.

The tenure of life of the Council of State has been fixed at five years and that of the Assembly at three years.* It is of course open to the Governor-General to dissolve either house earlier and before the expiry of the scheduled period. He may also, to meet a special situation, extend the life of either body beyond the specified term, and it is to be noted that the Assembly constituted in 1930 was not dissolved till the close of the year 1934. The Council

* Sec. 63D(1).

of State has a President to guide the deliberations of this house and similarly the Assembly has a President and a Deputy President of its own. Before the introduction of the reforms of 1919, the Indian Legislative Council was usually presided over by the Governor-General in person. This was quite in keeping with the character of that Council. But the members found it a great handicap, and the Indian publicists had demanded a separate President for the house. The President of the upper chamber is a person nominated by the Governor-General from among the members of the chamber.* For some time an official was appointed to this office. At present however a non-official member in the person of Sir Maneckji Dadbhoy occupies this position. For the Legislative Assembly it is laid down in the Act† that for the first four years of the life of this house, a person would be appointed by the Governor-General to be the President. He might or might not be a member of this body at the time of appointment. Actually he was recruited from outside. Sir Frederick Whyte who was a member of the House of Commons and had an excellent acquaintance with the rules of business of that body was appointed to be the first President of the Assembly. On the expiry of his term of office, the house, as laid down in the Act, was given the right of electing its own President from among its own members. The Deputy President also is so elected. Both remain in office during the term of the Assembly.‡

* Sec. 63A(2).
† Sec. 63C(1).
‡ Sec. 63C(2).

The jurisdiction of the Central Legislature was made extensive and wide. It has been pointed out already that in the Act of 1919 there is the provision of delimitation of powers and jurisdiction between the Central and the Provincial Governments. Some subjects were declared as central and some as provincial. But the Central Legislature was empowered by the Act* to pass laws for the whole of British India. It was not definitely laid down that it would be only for those subjects which were assigned to the Central Government that this Legislature would be entitled to pass laws. In fact under the circumstances such delimitation of legislative jurisdiction was not feasible. Only certain subjects were transferred in the provinces to the control of the Ministers who would be in charge of them in responsibility to the local legislature and electorate. Even in this sphere their independence of the Central Government was not exactly complete. Then as regards the reserved half of the Provincial Government, it was certainly and definitely responsible to the Central Government. Consequently it was not thought necessary to deprive the Central Legislature absolutely of all jurisdiction over subjects handed over to the provinces. But while such all-pervading authority was theoretically still vested in the Central Legislature, actually it could not but be limited in scope. It was laid down in Section 67 of the Act that the previous sanction of the Governor-General would be required for the introduction in either

* Sec. 65.

house of the Central Legislature a measure which would have for its object the regulation of a provincial subject or the repeal or amendment of any Act passed by a provincial legislature. This restriction has been sufficient in practice to make it impossible for the Central Legislature to impinge upon the jurisdiction of the provinces. Similar restriction has been imposed upon this Legislature with regard to the passing of a measure that may affect the public debt and public revenues of the country, the religion of any class of British subjects, the discipline of any part of His Majesty's military, naval or air forces and lastly the relations of the Government of India with foreign states. If again, in course of the discussion of a Bill in either house it transpires that it may affect the safety, or tranquillity of British India or any part of it, the Governor-General has the right to stop further proceedings.

With these restrictions, law-making power has been vested in the Central Legislature. A Bill may be introduced in any of the two houses either by a member of the Government or by a private member. Passed by the chamber in which it originates it must go over to the other house and when passed by this house as well it is placed before the Governor-General for signature. In case a Bill passed by one chamber is rejected by the other or is so amended by it that the amended Bill is unacceptable to the original house a veritable deadlock may ensue. In order that such a deadlock may be avoided, the Act* provides for the calling of the joint session of the

* Sec. 67(3).

two houses by the Governor-General. It should be noted that during the sixteen years that the Act has been in operation no joint session has been required to be called. Any way it should be explained that in matters of legislation the two chambers of the Central Legislature have been given equal and co-ordinate authority. The more popular house has not been empowered to override, under some conditions, the decision of the revising chamber.

It has been observed in the previous paragraph that once a Bill is passed by both the houses, it is submitted to the Governor-General. He has, on such submission, four alternatives before him. He may assent to the Bill at once which on receiving such assent becomes an Act and may forthwith come into operation. Secondly, he may not like the measure in some of its details and may send it back to the legislature for fresh discussion and amendment. Thirdly, instead of either assenting to the Bill, or rejecting it outright or sending it back to the legislature for fresh discussion, he may reserve it for the signification of His Majesty's pleasure upon it. And lastly, he may veto the Bill outright. It should be known that even in case the Governor-General has given his assent to the Bill and it has come into operation, it is still open to His Majesty in Council to disallow it. In that case the Act is set at naught and to that effect the Governor-General must at once make a notification.*

It should be repeated that the Governor-General in Council is responsible for the administra-

* Secs. 67(4), 68 and 69.

tion of the country not to the Indian Legislature but to the British Parliament through, of course, the Secretary of State. It is the Governor-General especially who is held responsible by the British electorate for the safety, tranquillity and good government of British India. In order that this function might be properly and efficiently performed it was thought essential that he should not be entirely dependent upon the Indian Legislature for the passing of laws which he might consider absolutely necessary for the due discharge of his responsibility. He should have authority to introduce laws, if so required over the head of the legislature or any chamber thereof. Under the Act* if a Bill, recommended by the Governor-General, is thrown out or unsatisfactorily amended by either chamber he is empowered to certify the original Bill as essential. In that case, irrespective of the fact that it has not secured the consent of one house, it may be brought into the other and with or without its approval it may be submitted to the Governor-General for signature. The Act thus passed is ordinarily to be placed upon the table of both houses of the British Parliament and on the expiry of a minimum period of eight days, it is to be submitted for approval to His Majesty in Council. In cases of emergency, such an Act as soon as it has received the signature of the Governor-General, may be brought into operation, though His Majesty in Council retains the right of disallowing the measure subsequently.

* Sec. 67B.

In order again to meet emergencies and tackle situations when the Legislature may not be in session the Governor-General has been invested with powers of temporary legislation. He may, to meet particular emergencies, promulgate ordinances. Once an ordinance is issued it may remain effective for a period of six months. On the expiry of such a period it is automatically to lapse. But usually when the Government is anxious to continue this emergency legislation beyond the scheduled period. it brings in a Bill embodying the provisions of the expiring ordinance, which, if not passed by either of the houses is certified by the Governor-General as essential for the safety, tranquillity or interests of British India, and duly becomes law with his signature. Certification of measures, the promulgation of ordinances and their subsequent embodiment in laws passed under Governor-General's special powers have been very frequent, and especially so during troublous times. The Governor-General is thus an important, if not the predominant, factor of the Indian Legislature. He exercises greater legislative powers than either house. He may reject a measure which has the approval of both the houses and prevent it from being the law of the land. At the same time he may, on his own responsibility and in the teeth of the opposition of both these houses, make a law which he may consider necessary for the discharge of his obligations.

As regards power over the purse some control has now been vested in the Legislature. This control is, in the first place, not of an absolute character.

Secondly, the control which has been so vested in the Legislature is not equally enjoyed by the two houses. The Assembly which is the more popular house has been assigned greater privilege in this respect than the Council of State. This was done certainly on the model of the English practice and procedure. In Great Britain, for long by convention and now by law, the upper house has been deprived of all jurisdiction over money bills. The raising of revenue and its appropriation to different heads of expenditure are within the exclusive domain of the House of Commons.

Under the Government of India Act* it is imperative that a financial statement embodying the estimated annual expenditure and revenue should be placed before the two chambers of the Central Legislature, and members of both these bodies have thereupon the privilege of a general discussion. As for the raising of revenue, a Bill for this purpose is passed according to the same procedure as any other legislative measure. It is not necessary that it should be first introduced in the lower house, though it is the practice that a taxation Bill whose one purpose is to raise revenue and is not connected with the regulation of trade and industry or any administrative reform is initiated in the Assembly and therefrom it is carried to the upper house. Any way in this field powers of the two houses are equal and co-ordinate. Like any other legislative measure again, if this taxation Bill is rejected or unsatisfactorily amended by the lower house it may be certi-

* Sec. 67A.

fied by the Governor-General to be essential for the discharge of his responsibility and with or without the consent of the other house it is then placed before him in the original form for his signature. A bill for increasing the salt tax in 1923 was the first measure so certified by the Governor-General.

As regards the appropriation of revenue to different heads of expenditure, the proposals to this effect must be made on the recommendation of the Governor-General alone. This principle is modelled on the English custom "that money cannot be voted except on the request of the crown." The proposals of the Government are placed before the Legislative Assembly in the form of demands for grants. The Member in charge of Education may for instance demand the grant of Rs.......... It is open to the Assembly to pass the grants or reject them. In case of rejection however the Governor-General has the right to restore them if he considers such restoration essential.* The Council of State has nothing to do with the voting of these grants. To this extent the privileges of the Assembly which are otherwise equal to those of the Council, are greater and wider. But although the general stipulation is that demands for grants are to be placed before the Assembly, there are specific exceptions in this matter. Proposals for appropriation of money for purposes of interest and sinking fund charges on loans, for the payment of salaries and pensions of persons appointed under the authority of His Majesty or the Secretary of State and for

* Sec. 67A(7).

expenditure classified as political, ecclesiostical and defence, are not submitted even to the vote of the Assembly. For these heads of expenditure, appropriation made by the Government of India is final and requires no discussion in the Aseembly.* In fact all discussion on these heads is taboo in the Legislature, unless the Governor-General concedes it out of his wisdom and favour.

So the Indian Legislature has been apparently given wide powers of legislation and some authority over finance. But in none of these fields this authority is absolute. If it is not exercised in accordance with the general ideas of the Governor-General in Council, it may be overridden and laws may be passed and money appropriated over its head. Nor could the system be otherwise in view of the fact that the responsibility for the Indian administration was not conceded to the Legislature but remained vested in the Governor-General in Council, who is accountable to the British Parliament and electorate for its proper and efficient conduct.

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* Sec. 67A(3).

CHAPTER VI

PROVINCIAL EXECUTIVE UNDER THE ACT OF 1919

The Government of India Act, 1919, practically did away with the differences which had hitherto continued between the status of one province and that of another. All provinces were now declared to be Governors' provinces. Burma and the North-Western Frontier Province were for the time being of course excluded from the privileges of the new reforms. But subsequently they also were admitted to them and altogether British India was now divided into ten Governors' provinces, all enjoying the same status and the same constitutional rights and authority. At the head of every one of these provinces, there would be a Governor appointed by His Majesty by Warrant under the Royal Sign Manual. In respect of the appointments for the three presidencies of Bengal, Madras and Bombay there was no necessity for the Governor-General being consulted. But in the appointment of a Governor to any other province, the Governor-General was given the statutory right of being consulted.* This distinction was maintained for reasons that were obvious. There was a demand on the part of the Indian public that the heads of provinces should be chosen not from among the

* Sec. 46 (2).

members of the Indian Civil Service but from British public life. The framers of the Government of India Act however had no intention to depart from the existing practice. They were in favour of sending out Governors for the presidencies of Bengal, Madras and Bombay direct from Great Britain but for the Governorships of other provinces they did not think it possible to supersede altogether the claims of the members of the Indian Civil Service. Actually at the start of the new era, three of the provinces were under Governors recruited from British public life, one province* was placed under a Governor recruited from the public life of this country† and the rest of the provinces were headed by Governors chosen from the Indian Civil Service. The practice of appointing a Governor from Indian public life was not continued after the resignation of the first gentleman so appointed. Nor has the practice of choosing the Governors of the three so-called presidencies from the British public life been uniformly kept up. The present Governor of Bengal, Sir John Anderson, was for instance recruited not from British public life but from the Home Civil Service. Any way out of ten provinces, the heads of seven were chosen from among the senior members of the Indian Civil Service. It was but common sense that in determining as to which of them should be promoted to the office of a Governor, the Secretary of State must have at his disposal the opinion of the head of the Indian

* Bihar and Orissa.

† The late Lord Sinha.

administration who was likely to know more of the past careers and achievements of the different civil servants in this country than any adviser in London. The Governor-General of course in making his recommendations in this respect would invariably consult his colleagues of the Executive Council. It is not necessary at this place to enter into the comparative merits and demerits of the two types of Governors. The question will be discussed in some detail at a later stage of this work.

The executive in the provinces was divided into two halves to be in charge of the reserved and the transferred departments respectively. The reserved departments were assigned to the Governor in Council. The maximum number of members to be appointed to the Executive Council in a province was fixed by the Act* at four. Actually the maximum number was appointed only in the three old provinces of Bengal, Madras and Bombay. Even in Bombay when the finances became rather disorganised as a result of the world slump in trade and commerce, the number of executive councillors was reduced. In Bengal also there was a talk for reduction but ultimately it was not decided upon and the original number was maintained. In the rest of the provinces the number was fixed at two. It is of course difficult to appreciate the differences in this respect between one province and another. If for smaller and less populated provinces, the smaller number was fixed and for larger and comparatively thickly populated

* Sec. 47.

provinces, the higher number was decided upon, the difference could have been explicable. But it is difficult to explain the difference in this respect between Bengal and U.P. If in the latter the administration did not suffer from the fact that there were only two executive councillors, it was unlikely that the administration would have so suffered in Bengal on that score. But all the same the province of Bengal continued to be burdened with four executive councillors.*

The Act laid down that one of the executive councillors who were to be appointed in the same way as the Governor, must have put in at least twelve years of service under the Crown in India at the time of appointment.† In practice, half the number was chosen from the Services and the other half from provincial public life. The members of the Services so chosen were except in three instances all Europeans. There were several principles which the Government carved out and followed in connection with the constitution of the Executive Councils. The Government would in the first place maintain a sufficient European element in the Council, secondly it would see to it that half the members were recruited from the Services and lastly the Government thought it expedient that a good portion should be selected from local public life. In order to give effect to these three principles, the Government usually found it necessary that the European element

* It was for the Secretary of State in Council to direct as to the number of members to be appointed to Executive Councils. Sec. 47(1).

† Sec. 47(2).

should be chosen from the Services and the Indian element from public life alone. So the Indian members of the Services practically found themselves barred out from the provincial executive sanctum.

Each member of the Executive Council was placed in charge of some reserved departments. For the working of these departments, he was responsible not to the Legislature but in the first instance to the Governor and then to the Government of India and Whitehall. In case his views in any important matter did not tally with those of the Governor, they were to be placed before the Executive Council and there the question might be decided by a majority of votes. Of course if it was a question of safety, tranquillity or interests of the province, the Governor might override the decision of the Executive Council and have his own way.* Any way the important fact was that the Executive Council was not accountable to the Legislature for the policy it pursued and the lines of action it took.

Otherwise however was the case in the administration of the transferred departments. These departments were placed in charge of the Governor acting with his Ministers whose number varied from province to province and in the same province from time to time. In Bengal the number was usually three while in U.P., the Punjab and Bihar it was two. The Ministers were to be appointed by the Governor from among the elected members of the Legislative Council. If in case a Minister at the time of appointment was not a member of this

* Sec. 50 (2).

category, he must be so elected to the Council in course of six months, otherwise he would not be entitled to continue as Minister.* In Bengal the late Mr. S. N. Mullick was appointed a Minister by Lord Lytton in 1924, but he failed to be elected to the Council and had consequently to leave the Ministry.

The Ministers were not only to be appointed by the Governor but to hold their office during his pleasure. He might dismiss them any time he chose and appoint new men instead. There was nothing in the Act to show that the Ministers would be responsible to the Legislative Council, and hold their office only so long as they retained the confidence of the majority of this body. But in this the Government of India Act followed the English and Canadian precedents. In theory the Ministers of Great Britain hold their office only during the pleasure of His Majesty who has the legal right to demand the seals of office any time he chooses. Similarly in the British North America Act there is no provision that the Ministers should be responsible to the Legislature. They are to be appointed under the Act by the Governor-General and hold office during his pleasure. It is by conventions and continued practice that both in the mother country and in Canada the principle of ministerial responsibility to the Legislature has been brought into vogue. In India also that was the idea at the back of the mind of the framers of the constitution. The Joint Select Committee had

* Sec. 52(2).

in fact recommended in its report* that the Governor was not to interfere as a rule in the administration of the transferred departments. The advice tendered by the Ministers in this sphere should not usually be disturbed by him. The Ministers should in other words be allowed ordinarily to have their own way and bear the responsibility of administering their departments. This responsibility they would of course owe to the Legislative Council below and not to the Governor above. The Instrument of Instructions† issued to the Governors was quite clear and explicit on this point. They must watch the relations existing between the Ministers and the Legislative Councils. In case they found that the advice given and the opinions advocated by the Ministers were in consonance with the ideas and views of the Legislatures they were not to dissent from and override them. In other words the Ministers holding the confidence of the majority in the Legislative Councils were to run their departments in their own way without being hampered by the interference by the Governor. The latter of course would have the right to warn them against the pitfalls of their policy which he might notice but the Ministers might overlook. If however even after this warning, the Ministers stuck to their gun, the Governor should waive his objection. The Governor of course would have the right to dissolve the Legislative Council and appeal to the electorate, if he found that the Ministers with the co-operation of the

* P. 14.
† Para. vi.

majority of its members were systematically pursuing a policy not in the interests of the province. But if the electorate was of the same mind as the Ministry and the majority in the Legislature he would of course be required to give way.

As the effectiveness of the Ministers' advice would depend upon their relations to the Legislature, the natural corollary was that if they lost the confidence of the Legislative Council, they must cease to hold office. The no-confidence of the Legislature was usually expressed either by a definite motion to that effect or by the refusal to vote the Ministers' salaries. In England, the Ministers would also resign if a particular policy enunciated by them were unacceptable to the House of Commons. But as a policy might be turned down or a Bill rejected by snap votes and on momentary impulse and the real will of the Legislature might not necessarily be expressed thereby, it was thought right by the Ministers in this early stage of the experiment of responsible government to refrain from resigning on such occasions. If however a definite no-confidence motion was passed, the Ministers were required to go out of office. Such resignations were of course regulated by conventions alone as the statute was silent about them. If during the last fifteen years and more the Montagu-Chelmsford constitution was worked in a normal atmosphere and under normal conditions possibly some well understood conventions and practices might have been evolved in this field and the later Governors, Ministers and Legislatures would have found it impossible to go back upon

them. But the first ten years of the Reforms were a stormy period and at first outside and then inside the Legislatures there was a party of members definitely and irrevocably committed to the principle of wrecking every ministry irrespective of its composition and its policy. This put the Ministers and Governors on their guard and resignation was not lightly thought of. On one occasion in Bengal, even when the demand for the grant of money for Ministers' salaries was refused by the Legislative Council, they continued to be in office. The Governor and these functionaries were waiting for the Legislative Council to revise its opinion a few months later when the supplementary budget would be placed before it. When on this occasion also, the grant was not passed the Ministers were at last compelled to resign. This action on the part of the Bengal Ministers illustrates how uncertain the practice has been in the matter of the Ministers' resignation of office.

In England and the other countries which have modelled their constitution upon that of Great Britain the Ministers are both jointly and severally responsible to the Legislature. They have their own portfolios and separate departments to control and to run. For the day-to-day administration of these departments they are singly responsible to the Prime Minister. But the major issues of the Government are for all the Ministers to discuss and settle in a meeting under the presidency and leadership of the Prime Minister. Once a decision has been arrived at in such a meeting, all the Ministers, and not merely the Minister in charge of the parti-

cular department with which the decision is concerned, are responsible for it. And if it is not acceptable to the Legislature and is turned down by it, the Prime Minister would take it as a vote of censure and all the Ministers would resign in a body. The chief advantages of this system are that the Government can be run as a unity and not merely as a collection of disjointed departments, each going on its own way, without its policy being correlated to that of the other departments. Secondly, when the Ministers hold together, the head of the state finds it difficult to interfere in their affairs and influence their decisions. If he knows that his interference in the affairs of one department may array the whole ministry against him, he is sure to be chary of such action and to keep himself aloof as far as possible. Nowhere in the world is there greater necessity for joint action on the part of the Ministers than in this country. The tradition of the head of the administration looking to distant London for inspiration, guidance and support is still overwhelmingly active in India. If the Ministers are to avoid the interference of the Governors and decide their lines of action only in responsibility to the Legislature, they must band themselves together and constitute themselves into a solid team, responsible as such for the major policies of the different departments.

The Joint Select Committee expected the Ministers of Indian provinces "to act in concert together." But the establishment of such ministries pre-supposed the organisation of political parties with policies and programmes of work of

their own. The party that would have for the time being the majority in the Legislature would be in power and its leaders would be in office. In the next election it might be defeated and a rival party with another programme of work and cherishing other principles of action might have the chance. But in the Indian provinces under the Montagu-Chelmsford Reforms such organised parties in the Legislatures were usually absent. The Congress party was of course in a majority in some Councils at some periods. But it was opposed to the acceptance of office. The late Mr. C. R. Das was offered the privilege of forming the Ministry in Bengal when he was returned to the Bengal Legislative Council in 1924 with his followers in the majority in that house. But he refused to avail of it. Similarly the leader of the Congress party in the Central Provinces did not accept the invitation to form the Ministry in that year.

In the Presidency of Madras where the Justice party was holding the majority in the Legislature and was in favour of working the reforms, the convention for a time of the joint responsibility of Ministers was created by Lord Willingdon, then the Governor of the province. The leader of the party in the Council was appointed the Chief Minister and the other two Ministers were chosen on his advice, and the three acted together and made a united front to the Legislature. Later on when one party had no longer a majority in the Legislative Council and some kind of a coalition government was necessary, the principle of having a Chief Minister was not abandoned. In U. P. also the

first two Ministers belonged to the same party (Liberal party) and saw eye to eye with each other. And about three years later when the Education Minister, Mr. C. Y. Chintamoni, thought it necessary to resign on the ground that a permanent officer of his department had carried a matter over his head to the Governor and without informing the Minister took a particular action, his colleague, Pandit Jagat Narain, also sent in his resignation and the two went out together. In Bengal however the Ministry was never constituted on the basis of collective responsibility. Sir Surendra Nath Banerjea who became a Minister in 1921 was consulted as to the choice of his Hindu colleague. But as for the appointment of the Mahomedan Minister, his advice was not sought and he came to know of the appointment of the late Nawab Nawab Ali Chowdhuri only from the announcement to that effect in the newspapers.* The idea of the Chief Minister and joint ministerial responsibility was entertained only once in this province and that when the late Mr. C. R. Das was offered the privilege of constituting the ministry. Neither before nor after this incident was this idea ever again acted up to. In fact during the sixteen years of the working of the Montagu-Chelmsford Reforms no tradition was built up in this respect and no convention was solidified in this field.

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* See *A Nation in Making*, pp. 337-9

CHAPTER VII

PROVINCIAL LEGISLATURE UNDER THE ACT OF 1919

The legislatures set up in the different provinces under the Act of 1919 were all unicameral in structure. The authors of the Report on Indian Constitutional Reforms, 1918, considered the proposal of setting up an upper house in the provinces. But on several weighty grounds the proposal was rejected. In many provinces, they thought, "it would be impossible to secure a sufficient number of suitable members for two houses." They apprehended also "that a second chamber representing mainly landed and moneyed interests might prove too effective a barrier against legislation which affected such interests." The establishment of an upper house might lastly make the legislative mechanism far too cumbrous and the passing of a law far too difficult.* But although they set their face against the establishment of a second chamber, they recommended a Grand Committee of the Legislative Council to be constituted from time to time.† According to this recommendation a provision for such a Grand Committee was embodied in the Government of India Bill. But the Joint Select Committee to which the Bill was referred recommended

* Pp. 166-67.
† Pp. 161-62.

the exclusion of this provision for a Grand Committee which it regarded as superfluous. Accordingly the Legislature set up under the Act of 1919 came to consist of one chamber only. It continued to be known as the Legislative Council. Its membership was of course considerably enlarged. The total number of members of this body was in Bengal 139, in Madras 127, in U. P. 123, in Bombay 111, in Bihar and Orissa 103, in the Punjab 93, in the Central Provinces 70 and in Assam 53.

It was laid down in the Act* that at least seventy per cent. of the members must be elected. The remaining portion was to be nominated but it was to be seen at the time of nomination that more than twenty per cent. of the total membership of the Council was not nominated from among officials. The representation of interests and communities was adopted as the underlying principle of the constitution of the Councils. The different racial, religious, industrial, commercial and cultural interests were granted adequate and separate representation upon them. To this end, the right to return representatives on their own account was conferred upon the Mahomedans, Europeans, Anglo-Indians and the Sikhs on the one side and upon the landowners, the chambers of commerce and the universities on the other. The Hindus, the Buddhists and people belonging to some nondescript religions and communities were lumped together as non-Mahomedans and given representation of their own in the Councils.

* Sec. 72A (2).

The principle of separate representation had been accepted by the Hindu leaders in the Lucknow Pact and it was consequently embodied in the Act without hesitation by the British Parliament. In 1909 Lord Morley, the Secretary of State, showed some scruples in advocating separate representation for the Moslems. But ten years later Mr. Montagu approached the House of Commons for separate representation with his conscience absolutely clear. It was arranged that the Mahomedans, 'non-Mahomedans,' Anglo-Indians and Europeans were to be returned by constituencies consisting exclusively of voters belonging to their own religious and racial groups. The people of one community would have no part or lot in the election of the representatives of another community. The candidates for seats in the Legislative Councils had thus to approach the voters who were affiliated to their own religion and race and had no occasion to woo the voters of other communities. As for the nominated non-officials, their number was not large in any of the Councils. Usually it was five or six. Only in one Council it was seven. Generally, nomination was made from among members of those groups of people who had gone unrepresented or inadequately represented as a result of the elections. In Bengal for instance at least one member was nominated from among people who belonged to backward classes. One member was again chosen from the Indian Christians. The officials nominated to the Council included as a rule the Secretaries and Deputy Secretaries to departments, the heads of some departments and several experts.

As in the case of the Legislative Assembly at the centre, the tenure of life of the Legislative Councils was fixed at three years, though the Governor was given the right of dissolving a Council earlier if he thought it necessary, and extend its life beyond the scheduled period if he considered it expedient.* None of the Councils were in fact dissolved before the expiry of their full term during the sixteen years that the statute was in operation. But their life was extended much beyond the scheduled period because of the exigencies of the introduction of the new constitution.

Every Council had a President† of its own and was no longer presided over by the head of the province as before 1921. During the first four years a President was appointed by the Governor of the province and on the expiry of that period the Councils were given the privilege of electing their own Presidents though this election had to be confirmed by the Governor. Similarly if the President elected by the Council failed to retain its confidence and a vote of censure was passed against him, the President would not go out of office if the Governor did not accept the verdict of the Council and assent to the resignation of the President. In the absence of the President, the Deputy President, similarly elected by the Council from among its members and confirmed in his office by the Governor, was to preside over the Council meetings.

* Sec. 72B.

† Sec. 72C.

The Legislative Council was given the privilege of entertaining a Bill in any subject which was within the ambit of local legislation. In case a Bill was concerned with the administration of any of the transferred subjects, it could not be placed on the statute book without its consent. If however it was concerned with the administration of any of the reserved departments it might be made an Act over the head of the Legislature and inspite of its refusal to approve of the measure. The Governor might certify that the Bill was essential for the discharge of his responsibility with regard to the particular subject to which this measure was related and thereupon it would be placed upon the statute book.* So in the reserved field the law-making power of the Council was as limited as that of the Central Legislature in its own domain. Even in the transferred sphere though no measure could become law without its consent, every measure passed by it was not necessarily to become an Act. It might be vetoed by the Governor or the Governor-General.

In respect of finance it was laid down in the Act† that a financial statement regarding the estimated revenue and expenditure would be placed before the Council every year. There were certain items of expenditure which were not to be submitted to the Council. These related to the interest and sinking fund charges on loans, to the salaries and pensions of officers appointed by or with the approval of His Majesty or the Secretary of State in

* Sec. 72E.
† Sec. 72D.

Council and to some other subjects. All other items of expenditure had to be submitted to the vote of the Council in the form of demand for grants. In case these demands were in connection with the administration of the transferred departments, the authority of the Council was final. If they were rejected or modified by the Council, they could not be restored. If however they were connected with the administration of a reserved subject and if they were rejected or modified, the Governor had the right to certify the expenditure as provided for in the original demand as essential for the discharge of his responsibility and in that case the Government would be entitled to spend the money as if the Council had voted the grants without demur. As in the field of law-making so in the sphere of financial control also the authority exercised by the Council was strictly limited and restricted in the reserved departments and substantial with regard to the transferred subjects. This could not have been otherwise as for the conduct of the reserved departments the Provincial Government was responsible not to the local Legislature but to the Governor-General in Council and through him to Whitehall.

CHAPTER VIII

General Estimate of the Reforms of 1919

The Government of India Act, 1919, transferred real responsibility to the representatives of the electorate only in a very restricted sphere of administration. But it afforded considerable opportunity to the people both for political education and for influencing the decisions of the Government. For the first time direct representation on a comparatively liberal franchise was conceded. It is true that only about six million persons were given the vote under the arrangement now introduced. This was a small number indeed in comparison with the teeming millions that inhabited the country. But as for the first time direct election was being introduced, this number was not as mean a one as it was by many people represented to be. Besides it would be unwise to suppose that only those who had the vote would have an opportunity of appreciating public questions and understanding the country's problems. As elections were direct and every three years polling would take place, they opened out an opportunity to non-voters as well for sharing the political education. In election times all the political and administrative issues would be brought to the fore and many of the people, voters and non-voters alike, would become alert and wide-awake. Their eyes and ears would be opened, their old pathetic contentment would be disturbed and a new interest in the present and future forms of government in their country would be created. This

was an advantage which should not be lightly disposed of.

It was true of course that constituencies could not be small and compact. We may leave out of consideration the constituencies carved out for elections to the Council of State as the voters in these cases were select and highly propertied. But the constituencies for the Assembly also were vast and far-flung. Usually a division of revenue and circuit consisting of a number of administrative districts was made a constituency but in some cases two such divisions were also lumped together for this purpose. It was not easy for the candidates to manage such huge constituencies and establish personal contact with the voters. The members returned by them found it similarly out of the question to approach their electors and cultivate with them that association which makes representative system so fruitful in other democracies of the world. Constituencies for the provincial Legislative Councils were not so vast indeed but in their cases also they were not in any way quite small and manageable. Sometimes two administrative districts would be grouped together to form one constituency. Here also difficulties, though lesser in proportion, were noticeable in the way of the elected representatives for their developing any intimate relationship with the constituents. But inspite of such deficiencies and shortcomings of the system, it cannot be denied that the direct elections by popular constituencies considerably improved the political education of the people.

If communal representation was not conceded and if all the elected members of the legislatures

were returned by territorial constituencies consisting of voters of all groups of people the difficulties would have been minimised and the obstacles in the way of carving out small and compact constituencies would have been largely removed. Under the arrangement introduced by the Act of 1919, Hindu and Moslem members were elected separately by overlapping constituencies, and it was on that score that these latter had necessarily to be large in size. This was not again the only blemish of the separate electorate which was a fundamental characteristic of the constitution set up by Mr. Montagu and Lord Chelmsford. Under this system the Hindu and Moslem candidates respectively had no opportunity of wooing the voters and canvassing the support of the other community. They had to limit their approach to the people who were affiliated to their own religions. The platforms of the two sets of candidates were entirely different. Their activities were in separate spheres, and the orbits of their movements seldom crossed. For purposes of election in fact, the two communities were entirely divorced from each other and it was but likely that in all political matters they would gradually draw absolutely apart. Separate elections afforded no opportunity for one community to influence the decisions of the other in the matter of the return of their representatives. In fact in 1909 Lord Morley had told the House of Lords* that lest the Moslem community might not get absolute and unfettered privilege of electing their own repre-

* Speech on Feb. 23, 1909. See Keith, *op. cit.*, Vol. II, pp. 91-93.

sentatives in their own way and lest their judgment and choice might be any way modified by the votes of the Hindus, the scheme of joint electorate which he had originally formulated had to be abandoned in favour of completely separate electorates. Under the Morley-Minto reforms the separatist effect of this arrangement was not felt so keenly because the number of persons elected was very small and even these few were elected only by select constituencies. The election enthusiasm had to be confined practically to a small knot of people and had no repercussion among the masses. Under the Montagu-Chelmsford constitution however the number of elected members of the legislatures was large, the constituencies were popular in character and vast in size and the prizes to be fought for were important and valuable. Consequently when two communities which had never been in history very friendly and cordial with each other, began to work in separate spheres, they not only drew apart but their relations became those of rivalry and even of hostility.

Apart from the direct elections which created enthusiasm, there were other features of the constitutional system which also gave a fillip to the political education of the people. The members of the legislatures had the privilege of asking questions to the Government and eliciting answers from them. They had also the right to put supplementary questions if they wanted further light upon the subjects concerned. In a responsible form of government such questions are an important instrument for enforcing the responsibility of the executive to the legislature. Now and again the Government

may be inclined to take steps which may not be really in consonance with the general views of the public. But for fear of exposure through these questions, they dare not act according to their passing whims. In England and more so in France the right to interpellate the Government has put in the hands of the members of the legislature and through them in the hands of the public a potent weapon for keeping the executive under control. In India the members of both the provincial and central legislatures enjoyed enormously the privilege of putting questions to the Ministers and Executive Councillors. It is true that in some cases these questions were of an erratic nature. But generally speaking they helped, on the one side, in educating public opinion, and on the other, in influencing and controlling the Government to some extent. Adjournment motions which the members of the legislatures had the right to move and which they never hesitated to move whenever any occasion arose were also of considerable value for the political education of the people.

So the reforms of 1919, however unsatisfactory in many of their features, had surely left an impress of their own upon the mind of the people. They have accelerated their political education and initiated them for the first time into the mysteries of both representative and responsible government. In case all the political parties in the country worked the constitution earnestly and faithfully, some healthy traditions might have been created, which would have stood us in good stead in the future.

CHAPTER IX

THE GENESIS OF THE NEW CONSTITUTION

In the preamble to the Government of India Act, 1919, it was expressly stated that the aim of His Majesty's Government in India was the progressive realisation of responsible government. But this progress was to be achieved only in stages, and the time and manner of each advance were to be determined only by the British Parliament. It was the object of the framers of the Act of 1919 that the system inaugurated by it would remain effective in India for at least ten years. It was only at the expiration of this period that further advance might be thought of. Accordingly it was provided for in Sec. 84A of the Act that as this decade of experiment would expire, a Commission of enquiry would be constituted with the approval of the two houses of Parliament. It would be the concern of this Commission to report, after due investigation, as to whether the degree of responsible government then prevalent in India should be extended or restricted.

The reforms of 1919 were never given a cordial reception in this country. They were declared almost unanimously by all parties as inadequate, unsatisfactory and disappointing. The Moderates who now style themselves as 'Liberals' agreed to work the new constitution no doubt but were not less critical of its features than the Congressites

who refused to have anything to do with this experiment. The latter did not participate in the first elections to the reformed legislatures. Early in 1924 they of course deviated from this policy of non-co-operation to some extent and entered the Councils, but they did it out of the set purpose of carrying non-co-operation within these legislatures. They took to the tactics of obstructing business with the hope of burying the new constitution and hastening the birth of a new and more satisfactory one. Outside the Congress circles also criticism of the Montagu-Chelmsford constitution became more frequent and trenchant, and a demand for its replacement became insistent. The Right Hon'ble Mr. Srinivasan Sastri as the President of the Liberal Federation in 1922 delivered a speech which was highly critical of the existing constitutional arrangement and administrative mechanism. Soon after the entry of the Congress party into the Legislative Assembly in 1924, a resolution was carried by this House * at the instance of the late Pandit Matilal Nehru. It demanded that a Round Table Conference be immediately summoned to recommend the scheme of a constitution for India.

The Government of India also made an attempt to meet half way this opposition and in the middle of this year appointed a Committee with Sir Alexander Muddiman † as the Chairman and with Sir Sivaswami Aiyar, Dr. R. P. Paranjpye,

* 18th Feb., 1924.

† The Committee was called the Reforms Enquiry Committee but is popularly known as the Muddiman Committee.

Sir Tej Bahadur Sapru and Mr. M. A. Jinnah among the members. It was to investigate into the working of the constitution, to find out the defects that had been experienced in working it and to recommend changes which it might be possible to introduce without changing the structure, policy and purpose of the Parliamentary Statute. The report which was submitted in December of the same year contained two parts. In the minority portion of this report which was signed by the Indian gentlemen named above, there was a recommendation for fundamental structural changes in the Act without which, these members thought, it would not work to the satisfaction of the people.

Meanwhile in the provinces the Swarajist members were busy with their policy of obstruction. They made it impossible for the transferred departments to be run normally at least in two provinces —Bengal and C. P. No ministry could be formed for a time in these provinces and the purpose of the Act failed so far as the transferred departments were concerned. This policy of obstruction was adopted by the late Mr. C. R. Das and his colleagues only in order to bring it home to His Majesty's Government at Whitehall that the constitution introduced in 1919 was unacceptable to the Indian public and should be soon replaced by a more liberal one.

The British Cabinet became at last convinced that some gesture must now be made to pacify Indian opinion. Accordingly the Conservative Government of Mr. Baldwin in which the late Lord Birkenhead was the Secretary of State decided to

amend Sec. 84A of the Government of India Act so as to facilitate the despatch of a Commission to India before the expiry of the stipulated period of ten years. The Section was actually amended by the Government of India (Statutory Commission) Act, 1927, and in the same year a Commission of seven members was set up with Sir John Simon as the Chairman.* Under the Act the members were to be chosen no doubt with the concurrence of the two houses of Parliament but subject to this provision there was no bar to the appointment of persons who were not members of the British Parliament. It was expected in India that if a Statutory Commission was appointed at all, it would consist of both Indians and Britishers. But, possibly, to obviate the choice of Indians, Lord Birkenhead suggested the appointment of an exclusively Parliamentary Commission, on which all the three political parties of Great Britain would be represented.

The announcement of the Simon Commission's appointment was greeted with disapproval from many quarters in India. The Liberals opposed it because it was an all-white body and no Indian was appointed to it. The Congressites opposed it both on this ground and also on the wider ground that the constitution of the country was too sacred a thing to be fashioned on the recommendations of a Commission which was appointed by an outside

* The members were Lord Burnham, Lord Strathcona, Mr. Edward Cadogan, Col. Lane Fox, Major C. R. Attlee, Mr. Vernon Hartshorn,

authority. The preliminaries of the constitution of the Dominion of Canada were settled by the Canadians in their own country and the British Parliament only cut the t's and dotted the i's before embodying them in the British North America Act.* The constitution of the Commonwealth of Australia was similarly the outcome of the prolonged discussions among Australians themselves in a series of Conferences and Conventions in their own country. The British Parliament merely registered their decision and embodied it in a formal statute. The Congressites of course attached no importance to the different situations which prevailed in Canada and Australia at the time that their constitutions were so shaped. Their standpoint was that, if constitutional systems of Canada and Australia could be the handiwork of their own people, that of India should similarly be the outcome of the deliberations of the Indians themselves. Of course, there might be points to be settled with the British Government. To this end a Round Table Conference might be arranged between the representatives of the Indian people and those of the British nation. The precedent for this also was not lacking. Only in December, 1921, the delegates of the Irish Republican Government and those of the British Cabinet had met in a formal Conference around the table and decided upon the terms of settlement

* It is based on the 72 Quebec Resolutions, which were adopted at a Conference of delegates from provinces of Canada, Nova Scotia, etc., held at the City of Quebeck, October 10, 1864. See A. B. Keith, *Speeches and Documents on Colonial Policy*, Vol. I, pp. 245-263.

between Great Britain and Ireland.* Similarly a settlement might be made between India and Great Britain and subject to its terms the constitution of this country might be fashioned by a constituent assembly convoked in India. This standpoint of the Congress might of course appear as too simple and too facile in the complex situation in which this country actually stood. But all the same it was rather stubbornly held by people who had been imbued with the idea of self-determination.

The appointment of the Simon Commission was not only unwelcome to the Indian people but they made their feeling quite vocal when it arrived in India for purposes of investigating facts and examining witnesses in February, 1928. Both the Commission and the British Government became now convinced that a blunder had been committed in excluding the Indians altogether from all share in the framing of a constitution for their country. It was therefore now decided to retrace the steps to some extent and modify the blunder as far as possible. It was arranged that for purposes of examining witnesses, sifting the evidences and holding joint deliberations there would be associated with the Simon Commission committees constituted by the provincial and central legislatures from among their own members. The Simon Commission was a parliamentary body and these committees would be constituted by the legislatures of this country. Associated together they were expected to convey

* See the terms of the Anglo-Irish Treaty, 6th December, 1921. Keith, *Speeches and Documents on British Dominions*, pp 77-82.

the impression that the future constitution of India would be shaped by the representatives as much of the British electorate as also of the Indian people. Of course the report that would be submitted to the British Parliament would be drafted on the responsibility of the Simon seven alone. But the report drafted by the Indian Central Committee might be also submitted for its consideration either as an annexure of the Simon report or as an independent document. The arrangement thus made was foreshadowed in a letter written by Sir John Simon to the Governor-General, Lord Irwin, early in February, 1928 (soon after the Commission had landed in India).*

Neither the Moderates nor the Congressites were very much appeased by this declaration. In the central legislature the Assembly refused to co-operate in this matter and declined to elect members to the proposed Central Committee. The Council of State, however, elected three members. The remaining portion was consequently nominated from among the members of the Assembly by Lord Irwin, the Governor-General, and the Central Committee thus constituted was presided over by Sir Sankaran Nair. In all the provinces also provincial committees were set up to help the Simon Commission in the examination of witnesses and in the appreciation of the local demands as to the future constitution of the different provincial governments. All these committees submitted independent reports of their own and they were available for reference both to the Simon Commission and the British

* See Report of the Simon Commission, Vol. I, pp. xvii-xix.

Government. Similarly the Indian Central Committee also made its own recommendations which were embodied in an independent report and published before the Simon report saw the light of day. At last in May, 1930 the report of the Simon Commission itself was placed before His Majesty and the public.

As the Simon Commission carried on its investigations, the situation changed in India for the worse. The animosity of a large section of the people grew apace against the Government and its methods of dealing with Indian questions. Mr. Gandhi who had held aloof from the Congress politics for some years past now re-entered the arena. In the Calcutta session of the National Congress held in 1928, a resolution making full independence the goal of India was not entertained by the majority but as the year 1929 advanced it became clear that in the ensuing session of the Congress at Lahore this resolution would surely be carried. While Indian opinion thus became more and more stiffened, in the general election of 1929 the Conservatives failed to maintain even a bare majority in the British House of Commons and the Labourites consequently came for the second time into office. These two factors were possibly responsible in the main for a new change in the attitude of His Majesty's Government as to the methods of constitution-making for India. Of course a very plausible ground for shifting the old policy was now available and the Cabinet of Mr. Ramsay MacDonald, in consultation with the leaders of the other parties in the Parliament, ex-

ploited it to the full for yielding as far as possible to the demand for a Round Table Conference.

On the 16th of October, 1929, Sir John Simon, the Chairman of the Statutory Commission, wrote a letter to the Prime Minister explaining the difficulties he had experienced in settling the lines of constitutional development for India. He pointed out that the Indian States were so intimately associated with the life of British India that no proper solution of the constitutional problem of the latter could be really attempted without introducing the future of the States into the discussion. He therefore suggested that after the publication of the report of his Commission, His Majesty's Government might, with profit, invite a few representatives of both the States and British India to a conference where the final conclusions might be evolved. This suggestion of Sir John Simon was accepted by the Cabinet * a few days later and the announcement as to the Round Table Conference was made by the Viceroy to the leaders of Indian opinion who were invited to meet him at Delhi.

This is the genesis of the Round Table Conference which met at its first session in London in November, 1930. The Indian National Congress refused to co-operate with this Conference on the ground that Dominion Status for India would

* Mr. MacDonald consulted the leaders of other parties and announced the approval of His Majesty's Government in his reply to Sir John Simon dated 25th October, 1929. See Simon Commission Report, Vol. I, pp. xxii-xxiv.

not be the basis of discussion in this gathering. The Conference was opened by His Majesty the King and presided over by the Prime Minister. It was a large body and consisted of sixteen representatives of the three British political parties, sixteen delegates from the Indian States and fifty-seven delegates from British India. A Round Table Conference may be successful only under certain definite conditions. In the first place there must be a rigid limitation of number, secondly there must be a rigid limitation of subjects under discussion and thirdly the members of the different groups in the Conference must be in a position to speak with authority. None of these conditions were present in the Indian Round Table Conference that met at London in 1930. A body of eighty-nine members may by all means be called a conference but surely not a Round Table Conference. Questions of franchise, questions of the structure of the legislatures and the formation of the electorates and questions like those of the allocation of powers and functions between the central and local authorities were not the proper subjects of the Round Table Conference at London. They were just the topics for a Constituent Assembly in India. They were not the issues to be settled between the representatives of the two halves of India on the one side and those of the three British Political Parties on the other. They were the internal issues to be settled among the delegates of different groups of the Indian people alone.

If a Round Table Conference was to succeed at all, its membership ought to have been limited

to twenty at most. Both the British and the Indian members ought to have been in a position to deliver the goods. The Indian wing should have consisted of a few accredited leaders of the people alone, who could have pressed the Indian claims and would not have complicated the discussion by raising extraneous issues. Secondly, the subject-matter of discussion ought to have been the constitutional status alone. Of course it would have automatically included a few other questions like those of the Defence and Civil Services as Irish discussion in December, 1921 included questions of the Royal Irish Constabulary and similar other topics. But all the same the aim and purpose of the Round Table Conference ought to have been mainly the constitutional status of India. That being settled at London, the remaining problems and issues should have been left for discussion in India in a Constituent Assembly. It is of course true that such a discussion on a limited subject would have been possible only if the British Government had already decided to hand over the control of affairs to the representatives of the people here and wanted only to settle the conditions on which this transfer would take place. Secondly, such a discussion would be feasible only if all groups of people regarded the constitutional status as the only major issue and the remaining questions as minor ones to be amicably settled among themselves. Thirdly, a conference like this might be thought of only if the country could afford to send a small and compact delegation with full authority to settle the question of the constitutional

status. If this delegation spoke with more than one voice the conference would not succeed.

It must be admitted here that Indian situation was not ripe for a true Round Table Conference in 1930 or at any time since then. In the first place the British Government though ready for substantial concessions in certain spheres was not ready yet to transfer control over all affairs, even under well defined conditions, to Indian hands. Secondly, it was not a fact that all groups of people in India regarded India's constitutional status as the crux of the question to be settled between India and England. The communalists regarded the principles of representation and the communal quotas in the legislatures and the services as the most important subject to be decided first. Discussion on every other subject, including that of the constitutional status, depended for its success upon this decision. The Princes again considered the questions of paramountcy and their own internal authority as more important than any other topic. The landholders surely would not accept any solution if it was inconsistent with their present position. This being the situation, it was unwise to demand a Round Table Conference and to expect success when it actually happened to meet.

Of course the Round Table Conference was not absolutely without utility. It became an excellent clearing house of ideas and the training ground of some political careers. Some of the delegates from India were already well known figures in the political life of the country. A few others were comparatively dark horses. An opportunity

was now afforded to all to make and add to their reputation. Men like Sir Tej Bahadur Sapru, Mr. Srinivasan Sastri, Mr. C. Y. Chintamoni, Dr. B. R. Ambedkar and the late Sir Muhammad Safi won fresh laurels as effective debaters and consistent fighters for their country's and communities' interests. A few others again like Sir Zafrullah Khan won their spurs in this Conference and made their contribution to its debates the basis of their rapid rise to power and influence.

After a few speeches in the plenary session, the Conference broke up into a number of committees the most important of which was the Federal Structure Committee and among the rest were the Services, the Minorities, the Franchise, and the Defence Committees. The federal, the minority and a few other questions remained still outstanding when the first session of the Conference came to a close. The second session which was held in the autumn of 1931 was attended by Mr. Gandhi as the sole representative of the National Congress.* He presented its political demand to the Conference with his characteristic lucidity. But it seems to have fallen flat upon the Conference. The session of course was not altogether barren of result. It further threshed out some of the outstanding questions. But it would take long yet to complete the task of constitution-making. The Round Table Conference itself had to be called for

* Early in 1931, an agreement had been arrived at between Lord Irwin and Mr. Gandhi known as Gandhi-Irwin Pact. Lord Irwin had agreed on behalf of the British Cabinet that the discussion in the R. T. C. would be on the basis of Dominion Status for India.

the third session in 1932. But the Conference which met in this year was a body of a far smaller size and did not include many of the members who had been prominently associated with the Conference in its earlier sessions.

On the conclusion of the labours of the Conference the Government proceeded to draft its constitutional proposals. These were duly framed and published in a White Paper early in 1933. These proposals again were submitted to a Joint Committee of both Houses of the Parliament over which Lord Linlithgow, the present Viceroy of India, presided. With this Committee were associated some prominent Indians not of course as members but only as assessors. The Committee examined witnesses afresh, the chief among whom was Sir Samuel Hoare, then the Secretary of State for India and the person mainly responsible for the White Paper proposals. The Committee submitted its report towards the close of the year 1934. It did not disturb very much the structure proposed in the White Paper. Only in some details it deviated from the proposals which this document had put forward. At last on the basis of the proposals of the White Paper as amended by the Joint Committee, a Bill known as the Government of India Bill, 1935, was introduced in the Parliament and became an Act with slight modifications on the 2nd of August, 1935.

Thus after eight years of travail the new constitution for India saw the light of day. The process of its birth was a peculiarly long drawn out one. The methods adopted to bring about its

safe delivery varied from time to time as the chief surgeons in waiting shifted from the scene one after the other. The Round Table method which was adopted on the formation of the Labour Government was only an innocuous interlude. It was used for a while for some spade work and then abandoned as unsuited for the more serious and substantial work. It was not responsible for the framing of the actual proposals which were embodied in the Bill. The weapon in fact as fashioned in 1930 and after was found too crude for this purpose. With the exit of the Labour Government and the formation of the National Government in 1931 it was increasingly given the cold shoulder and ultimately altogether cast aside.*

The baby that arrived after such a circuitous journey was inevitably far larger in size than normally it could be expected to be. But whether it is correspondingly healthy and vigorous it remains to be seen as years roll on. It has not yet been wholly placed in its cradle. It is still half in the arms of the midwife.

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* See in this connection an article on The Outlook on the Indian Reforms by the Rt. Hon'ble Wedgewood Benn, Secretary of State for India in the Labour Government, 1929-31, in the *Political Quarterly*, July, 1935.

CHAPTER X

Constitutional Status of India

The Government of India Act, 1935, does not indeed formally define the exact constitutional status which India will occupy henceforward in the British Commonwealth of Nations. But the other provisions of this statute really leave no room for hesitation in this respect. It excludes certain important departments, *e.g.*, foreign affairs, ecclesiastical affairs and the defence of the country altogether from the purview of Indian legislative control. They are the departments to be run by the Governor-General in full responsibility to Whitehall alone. The special powers conferred upon the Governor-General and the Provincial Governors in respect of functions which have been transferred to Ministerial control are also certainly to be exercised by these officers only in responsibility to the Secretary of State and the British Parliament. In regard to the Indian States again the functions and powers of paramountcy will not cease to be effective with the inauguration of the new constitution. They will be vested henceforward not in the Government of India but in His Majesty's Representative who will discharge these functions and exercise these powers as an agent of the British Cabinet. The control of Whitehall over Indian affairs will thus continue to be effective in many important and fundamental matters in the new order of things,

and with such far-reaching limitations upon the jurisdiction and authority of the Indian people and their representatives, India will hardly in fact cease to be a dependency of Great Britain. The authority of His Majesty's Government may not be henceforward so absolute over Indian affairs as it has been up till now. It may be in the new regime limited and circumscribed to a degree but all the same it will be there in important matters. So the status of a dependency may be modified but it will not be altogether eliminated as the new constitution is brought into full operation.

While for the present the constitutional status of India* will be indubitably that of a dependency, there is a good deal of controversy as to the status to which it is the aim of British policy to raise this country in the future. In the declaration of August 20, 1917, the Secretary of State for India gave it out to the world that it was the object of British policy to grant to India full responsible government by stages. This declaration was bodily incorporated in the preamble of the Act, 1919. In the new Act of 1935 there is no allusion to this question and consequently it is to be assumed that the policy as declared in 1917 and as incorporated in the statute in 1919 still stands and has not been superseded. Along with the declaration of this policy, India was given from time to time certain privileges in international and inter-imperial matters, which had been once regarded only as the concomitants of

* The problem of India's constitutional status was clearly and very exhaustively dealt with in a paper published by Mr. T. Chakravarty in the *Calcutta Review* in its issue of August, 1935.

Dominion Status. In the Colonial Conferences which were held in 1887, 1897, 1902 and 1907, only Great Britain and the Dominions were represented. India had no part or lot in their deliberations. As for the first Imperial Conference held in 1911 Lord Crewe was present no doubt in a few of its sittings as the Secretary of State for India. But this casual association of Lord Crewe with the Conference did not certainly indicate any re-orientation in India's relationship to this body. The War, however, created a new situation and in the Imperial War Conference which was invited to meet in 1917, India was given an honourable place. A resolution was passed by this Conference on the 8th day of its sitting (13th April, 1917) that India should be permitted to be "fully represented at all future Imperial Conferences." A few days later (16th April) another resolution was carried which recognised "India as an important portion of the Imperial Commonwealth having the right to an adequate voice in foreign policy and foreign relations."* The step now taken might be due to the exigencies of the war but the resolutions passed by the War Conference in 1917 continued to be binding in post-war conditions as well. To the Peace Conference of Versailles for instance India was invited to send delegates and the late Lord Sinha and His Highness the Maharaja of Bikaner were the signatories to the Treaty on behalf of India. This country was also allowed to be associated with the League of Nations as one of its original members. In the Imperial

* See the Resolutions in Keith, *op. cit.*, Vol. II, pp. 132-33.

Conferences which met in London in 1921 and 1923 India was as fully represented as Canada or Australia.

So India appeared before the world for years together in at least the outward trappings of a Dominion. And to the Indian people this would suggest that time would not be distant when their country would have the same status in the British Commonwealth as Canada or Australia. The idea so cherished by the Indians themselves was not only not discouraged but actually encouraged by the declarations of high and responsible personages and that on occasions which were, to all eyes, important and solemn. His Highness the Duke of Connaught, a son of Queen Victoria of happy memory, delivered to the Indian people a message of His Majesty the King-Emperor on the occasion of inaugurating the new Indian Legislature early in 1921. The message assured them of " the beginnings of Swaraj " which had now been introduced in their country and which would afford them the opportunity of gradually climbing that height of liberty and freedom which the people of His Majesty's other Dominions happened at the time to enjoy. In the revised Instrument of Instructions also which His Majesty issued to the Governor-General of India in the same year he referred to his will and pleasure that India might attain in time " its true place among our Dominions." In October, 1929, Lord Irwin (now Lord Halifax), then the Viceroy of India, announced on behalf of His Majesty's Government that " it is implicit in the declaration of 1917 that the natural issue of India's constitutional

progress, as there contemplated, is the attainment of Dominion Status." Lastly in 1930 and 1931 Mr. Ramsay MacDonald, then the Prime Minister of England, declared in so many words while speaking in and about the Round Table Conference that Dominion Status for India was the end towards which he and his colleagues were working.

Inspite of such solemn declarations and inspite of the definite statement in the House of Commons, of the Secretary of State, Sir Samuel Hoare, that Dominion Status was the goal of British policy in India, no reference was made to it in the Government of India Bill which became Act in 1935. In the House of Lords, Lord Snell who had been Under-Secretary of State for India in the Labour Government brought in an amendment to the Bill by way of expressing his point of view that this ideal of Dominion Status which both the British Government and the Indian people happened to cherish should be statutorily recognised. But Lord Zetland refused to accept the amendment on the ground that Dominion Status was something incapable of statutory definition. The amendment was negatived and the Bill without containing any reference to the subject was placed upon the statute book.

This refusal of the British Cabinet to give any statutory recognition to the ideal of Dominion Status has created some misgivings in the mind of a large section of the Indian people. The plea that Dominion Status was not capable of any clear definition and on that ground it could not be accommodated in the Act appears to them as only specious. In the treaty which the British Cabinet arrived at with the

Irish delegates in 1921 threre was a reference to the status which the Irish Free State would enjoy. It was laid down that its status would be the same as that of the Dominion of Canada. Something similar might have been laid down with regard to the future constitutional status of India as well. The difficulty, if there was one at all, could have been in fact easily obviated. Already in 1924 in a debate in the Indian Legislative Assembly Sir Malcolm (now Lord) Hailey tried ingeniously to discover a difference between full responsible government which was the aim of the British Government to introduce in India and the Dominion Status which was being demanded by the Indian leaders. This roused the suspicion of the Indian people to a degree as to the bonafides of some of the declarations made on solemn occasions. Now when no reference was made in the Act of 1935 to Dominion Status as the goal of British policy in India the suspicion of our people thickened further, especially as it had been pointed out by certain members of the British Parliament that no declaration however solemn and august had any value unless it had been embodied in the Statute.

The difference between Dominion Status and full responsible government, however, is really the difference between twiddledum and twiddledee. Dominion Status is the status which the Dominions like Canada and Australia now happen to enjoy. This status as a free and equal member of the British Commonwealth of nations is the natural and logical outcome of the working of that responsible government which it is the policy of the British

Parliament to introduce gradually in India. As responsible government became fuller and wider in scope and operation in the Dominions, the authority of the mother country had to be loosened and relaxed. One branch of public administration after another had to be carried on in responsibility to the representatives of the local people alone. Gradually the process became complete and every affair of the country could be dealt with only in accordance with the wishes and desires of the people. There was left in fact no department which could be run according to the ideas imposed from Whitehall. When this stage was reached, the Dominions secured automatically the status which is associated with their title. If India is led sincerely from stage to stage and ultimately attains full responsible government, there would be not a department whose administration would be conducted according to the dictates of the India Office. If no vestige of British supremacy is left, if all the public questions are dealt with only in accordance with the demands of the electorate and public opinion here, the position of India will be as good as that of any Dominion. If it is therefore accepted that in time India will have full responsible government, it need not give us any trouble over the fact that Dominion Status has not been statutorily promised to us. Of course, this may be said that if Dominion Status were mentioned in the Act of 1935 as the goal of British policy, it would have emphasised further the preamble to the Act of 1919. But any way as that preamble still stands, and as an earnest of the policy enunciated therein a further dose of respon-

sible government has been granted, it may be safely assumed that there is no ambiguity as to the ideal towards which the framers of the Act of 1935 were working.

So it may be asserted that although the present status of India is to all intents and purposes that of a dependency, it is gradually gravitating towards that of a Dominion.

CHAPTER XI

THE FEDERAL SYSTEM

The constitution set up by the statute of 1919 was not federal in character. But it placed India on the road to federalism. It kept up no doubt the unitary character of the Indian constitutional organisation, but it introduced features, at the same time, which were the presages of the coming federation. Already in the Delhi Despatch of Lord Hardinge (1911) was envisaged the course which the political system of this country was to take. It foreshadowed that, in the future, India would be a federation of autonomous provinces. It was quite in conformity with the policy thus enunciated that the Government of India Act, 1919, provided for a clear division of functions between the Central and Provincial Governments and even laid down that certain of these latter functions would be carried out only in responsibility to the local Legislative Councils. It was but in the nature of things that in the course of a few years more the remaining provincial functions would be similarly released from the ultimate control of the central authority and full autonomy so far as these provincial functions were concerned would be conceded to the provinces.

Responsible form of Government introduced by the Act of 1919 only in a limited sphere inevitably whetted the public demand that the adminis-

tration of the remaining provincial functions should also be subjected to full local control. Once in fact the line of development had been drawn up, people became eager to traverse the whole length along this route. There were very few public men in this country who did not become enamoured of the constitutional development of India along federal lines. Only Mr. Vijiaraghavachariar of Salem who had presided over the Nagpore session of the Indian National Congress (1920) and Mr. K. Natarajan of the *Indian Social Reformer* of Bombay were the outstanding public men to stand against the current. They were definitely and pronouncedly of opinion that the growth of the Indian constitution on the basis of federal principles would be a menace to the maintenance of our national solidarity. There was already an inherent tendency in this country towards separatism. Centrifugal forces had been in fact too dominant throughout the whole course of Indian history. Indian nationalism was but an infant sentiment and required persistent nursing and careful feeding. Common Government was an important factor of its growth. If, therefore, the unitary principle was abandoned and different autonomous authorities in the country were set up, they would give a fillip to the dormant separatist forces which would not take long to engulf the national structure. If nationalism was not to be undermined and political unity of the country was not to be endangered, it was essential that the unitary system should continue undisturbed. But Messrs. Vijiaraghavachariar and Natarajan only cried in the

wilderness. The rest of our publicists threw themselves listlessly into the current and federalism became the fashionable political demand.

The Moslem public also added momentum to the federal movement. In the whole country they were in a minority, and had little chance of dictating by themselves the policy of the Central Government. They were however in a numerical majority in some of the provinces. If India was federally organised and these provinces came to enjoy full local autonomy, in these parts of the country at least they would have an opportunity of shaping the government policy. With this hope they cast their influence on the side of federalism. It will be seen later that with the same object in view they also became ardent advocates of residuary functions being vested in the Provincial Governments.*

Meanwhile the attitude of the Princes became another important factor in the development of the federal idea. Up to the inception of the Montagu-Chelmsford reforms they had been more or less indifferent to the affairs of British India. But the introduction of these reforms created a new situation. The paramountcy rights of interfering in the internal affairs of the states had grown in many cases gradually and insensibly. They were not sanctioned by the treaties which were supposed to determine in many cases the relations between the British Government and the Governments of the States. Their Highnesses were naturally opposed in any event to this unconstitutional interference.

* See N. C. Roy, *Federal India* (Book Company, Cal.), Chap. II.

Their opposition became all the more keen when the Government of India which exercised the paramountcy rights on behalf of the Crown became increasingly Indianised. They might have been outwardly at least reconciled to the control exercised by the Governor-General in Council so long as this Council consisted exclusively of Britishers but as a British Indian element was included in it first in 1909 and then to a greater extent in the new regime, their impatience grew apace.

Under the Montagu-Chelmsford reforms the Princes had been provided with a rallying ground. A Chamber of Princes was brought into being with its headquarters at Delhi and its Standing Committee was the mouthpiece that gave vocal expression to the growing impatience of their Highnesses. Along with their discontent in respect of the rigid exercise of paramountcy rights, their complaint in regard to the formulation of tariff policy and the realisation of the customs revenue also grew louder every day. The Princes and their agents now demanded a share in these privileges. They persuaded the Secretary of State in 1927 to appoint a Committee to investigate into the relationship between the States and the Paramount Power. It became known as the Indian States Committee and was presided over by Sir Harcourt Butler. The appointment of this body and the trend of evidences placed before it could not but strain the relations between the two halves of India and create an atmosphere of distrust and rivalry between them. The growth of such a feeling alarmed the sober men on both sides and their

thoughts were directed to the exploration of all avenues for bringing about a more friendly and more intimate relationship between the two Indias. It became their increasing conviction that the problem would be satisfactorily solved if only the two could be united in a framework of federalism. All-India federation of course did not all at once become a popular cry. The idea still remained confined to a small section of the people. But schemes henceforward came to be formulated in different parts of the country for achieving this purpose.

Already Mr. Montagu and Lord Chelmsford in their Report on Indian Constitutional Reforms found it possible to picture India as presenting to them "the external semblance of some form of federation." They thought it possible that as the Government of India would be gradually concentrating only upon those functions of administration which were common to all the provinces, the States would have a growing opportunity of establishing closer association with this Government.* The change in the outlook of the people since this cautious opinion was expressed was exemplified by the view entertained by a Committee which was set up ten years later by an All Parties Convention held at Bombay. This Committee was constituted as an answer to a challenge of the late Lord Birkenhead, the Secretary of State for India. He

* Report, para. 300. The conception of the authors of the Report as to the political future of India was a "sisterhood of states, self-governing in all matters of purely local or provincial interest. . . In this picture there is a place also for the Native States."

had remarked that if the people of this country could produce an agreed constitution, it would not fail to receive due consideration at the hands of His Majesty's Government. The Committee was presided over by the late Pandit Matilal Nehru and one of its members was Sir Tej Bahadur Sapru. It was commonly known as the Nehru Committee, and submitted its report in the middle of 1928. It admitted the possibility of including the States in the federation which it recommended for establishment in India. "It would be very poor statesmanship and short-sighted policy," it observed, "to ignore those obvious historical, religious, sociological and economic affinities which exist between the people of British India and the people of these States. Nor do we think that it is possible to erect artificial geographical barriers between the two."* The Committee, of course, limited the federation which it wanted to see established only to the provinces of British India for the present. But this was only because the attitude of the Princes was not yet quite clear.

The Simon Commission also emphasised the importance and necessity of closer association between British India and the States. Geographically they were interwoven very closely and in many places the States and the provinces formed a most intricate chequer-work. Economic forces were also such that the two Indias must stand or fall together. In view of these facts isolation of the States from British India would be both inconvenient and im-

* Report, p. 71.

politic. The Commission therefore suggested provisionally that a "Council for Greater India" should be created by Proclamation.* By its terms of reference it was of course precluded from examining any witnesses of the Governments of the States and consequently could not deal with the problem exhaustively and finally. Its Chairman however, as pointed out already, wrote a letter to the Prime Minister in the previous October in which he emphasised the necessity of calling a Conference to which the representatives of both British India and the States were to meet the delegates of His Majesty's Government for the discussion of this question.

When the Round Table Conference was announced by the British Government, the Maharaja of Bikaner observed in an important statement that federation had no terrors for the Princes. There was in fact for a time considerable enthusiasm as much among them as among the British Indians for the federal idea. In the plenary session of the first Round Table Conference also this enthusiasm was kept up and Their Highnesses spoke eloquently of the federal bonds towards the forging of which they were now at work. In fact so long as the generalities of the question alone were discussed, the Princes and their Ministers had no hesitation in their support of the federal idea. But when in the Federal Structure Committee, the details were taken up for discussions their attitude became increasingly cold. They did not grasp the fact that

* Report, Vol. II, para, 236.

in the Federal Government they would have their due representation no doubt but at the same time they would be required to surrender to this authority some of the powers and functions which they had hitherto exercised by themselves. It was to this surrender of power that they seemed increasingly disinclined. Their enthusiasm gradually reached almost the freezing point. And it is a fact to be noticed that a few months after the conclusion of the first Round Table Conference, His Highness the Maharaja of Patiala, at the time the Chancellor of the Chamber of Princes, circulated a note among a number of his brother Princes. In this document he threw overboard the idea of federation with British India and framed a scheme of loose confederation. It was of course not seriously pushed but it showed which way the wind was blowing. Their reluctance to hand over real power to the Federal Government became chronic and although the Princes refrained from declaring in so many words against the federal idea their reluctance is writ large on the scheme of federation that has ultimately been embodied in the Act of 1935.*

The Indian federation that is contemplated in the Act will consist of the British Indian provinces and those of the States which will accede to it. So far as the provinces are concerned, they are not sovereign States with option to retain all their authority or part with a portion of it at discretion. The Act of 1935 in conferring upon them autonomy

* N. C. Roy, *Federal India*, Chap. IV.

only grants them the powers which they will happen to exercise as units of the coming federation. The remaining powers are vested in the Government of India. Once the federation is started these powers in respect of the provinces will be exercised automatically by the Federal Government. The States however, subject to the privileges and rights which the Crown as the paramount power happens to enjoy over them, are independent entities and cannot be forced into the federation by the fiat of the British Parliament. It is their option to come into it or remain without. Those of the States which will express their willingness to enter the federation will be required to execute through their Rulers an Instrument of Accession and on its acceptance by the Crown they will be members of the federation.* There is a limit of course as to the minimum number of States which must so agree to accede to the federation before it is launched upon in this country. It is laid down in the Act that at least those of the States whose aggregate population is not less than one-half of the total population of the States and which are entitled to choose not less than fifty-two members of the upper chamber of the Federal Legislature must execute the Instrument of Accession before the federation will be given the start. Even when this requisite number of States is agreeable to enter the federation, the approval of both Houses of the British Parliament must be secured before it can be established. The two Houses must each present

* Sec. 6 (1).

an address to His Majesty to the effect that the federation may be set up and then only its career will begin.*

A clear division of functions and powers between the Federal and Provincial Governments is the first essential of federalism. Each Government must be sure of the position it occupies and must be definite as to the powers and functions it is to exercise. Without this drawing of the boundary line which neither the Provincial nor the Federal Government is to overstep, there can be no federation worth the name. The exact position of the line, as Mr. Justice Clement† observes, may shift from federation to federation but without its maintenance, wherever it is located, federalism becomes a fiction. The Statute of 1935 has provided as far as possible for a clear division of powers and functions between the Provincial and the Federal Governments.

In Federations like the United States and Australia the Constitutions mention only those powers which are exclusively or concurrently vested in the Federal authority, while the residuary powers and duties are assigned to the State Governments. In the case of the Dominion of Canada, however, the powers and functions granted to both the Governments are mentioned in the Act which embodies the constitution. But those functions which are not mentioned in the Act are to be exercised, according to the usual interpretation of the

* Sec. 5.

† *Law of the Canadian* Constitution, p. 371.

statute, by the Dominion Government.* The Government of India Act, 1935, deals with the subject of the division of powers as elaborately and as exhaustively as possible. In the seventh schedule of this Act there are three lists of powers and functions. Under Section 100 of the Act, the powers and functions contained in the first list are the exclusive concern of the Federal Government, those contained in the second list constitute the exclusive domain of the Provincial Governments while over the duties enumerated in the third list both the Governments will have concurrent jurisdiction.

The character of the distribution of powers between the two authorities depends in every federation upon the traditions and feelings of the people and the exigencies of the situation. In the United States of America localism was too strong among the people of the federating states at the time that the constitution was framed and a few absolutely indispensable functions and powers were alone in consequence delegated to the Federal Government while the rest of the duties remained vested in the State authorities. In Australia also local sentiment was strong though not to the same degree in this country in 1900 as it had been in the U.S.A. in 1787. Consequently some more powers were vested in the Federal Government in this Commonwealth but all the same the residuary duties became

* No. 16 of Section 92 of course militates against this interpretation. It gives the provincial government authority over "generally all matters of a merely local or private nature in the Province." So the provincial government has authority not merely over 15 enumerated subjects, but over all other subjects of a purely local nature. See *ibid*, p. 452.

the concern of the State Governments. In Canada also local sentiment was not less ardent, but the framers of the federal constitution were frightened by the danger of the dissolution of the American federation as a result of the Civil War and thought it wise to make the Central Government strong and powerful so that there might not be any risk of the federation being similarly threatened by a civil war.

The leaders of the Indian provinces appreciated local sentiment to a great extent no doubt and regarded provincial autonomy expedient indeed but were not in favour of making the Federal Government only an exception and the Provincial Government the rule. They were not ready to go back upon all the "unifying and solidifying influence" of hundred and fifty years of British administration. They were not in fact prepared to forego the usefulness of a strong and powerful Central Government in this country. All the same the atmosphere was such that some of the functions which were not handed over to the provinces under the Act of 1919 were now demanded on behalf of, and transferred to, the Provincial Governments.

The lists have been drawn up as exhaustively as experience and imagination could make it possible. In the federal list of powers and functions (List I) there are as many as fifty-nine items and in the provincial list (List II) there are fifty-four of them, while in the concurrent list (List III) there are thirty-six. Among the major subjects included in the federal list are the external affairs, defence, and ecclesiastical affairs; currency, coinage and legal tender; public debt of the federation

and federal public services; federal railways and the regulation of all railways other than minor railways in respect of certain important matters; major ports; duties of customs including export duties; corporation tax; the conduct of banking business by corporations; taxes on income other than agricultural income; and offences against federal laws. In the provincial list are included the maintenance of public order and control over the police; the administration of prisons; public debt of the province; provincial public services; local self-government; public health and sanitation; education; agriculture; forests; land revenue; and offences against provincial laws. In the concurrent list are included criminal law and criminal procedure; marriage and divorce; bankruptcy and insolvency; factories; welfare of labour and trade unions; and electricity.

The main reason why the lists have been so exhaustively drawn up is that the framers of the Act were unwilling to leave much as residuary powers. There was a conflict of opinion between the Hindus and the Moslems as to the authority in which the residuary functions were to vest. The Moslems as pointed out already were eager to strengthen the provincial authorities and on that account wanted the residuary functions to be assigned to the provinces. This was one of the demands incorporated in the now famous Fourteen Points of Mr. Jinnah. The Hindu opinion was however averse to this point of view. It wanted the residuary powers to be given to the Federal Government. By way of reconciling these oppo-

site standpoints the framers of the Act assigned to no Government the residuary functions. One Government has not been given enumerated powers and the other the rest of them. Both the Governments will have authority over a clearly defined field. But although the lists of powers and functions have been drawn as exhaustively as human ingenuity could devise still there is the possibility of some new and unenumerated duty cropping up at one time or another and calling for governmental intervention. The question will then naturally arise as to which of the two authorities will undertake this function.

Section 104 of the Statute makes provision for meeting an emergency of this character. Whenever the necessity of an exercise of such power in the unenumerated field will arise, it will be for the Governor-General to empower by public notification either the Federal or the Provincial Government to undertake the task. In discharging this duty, the Governor-General will not be acting as a limb of the Federal Executive. He will be acting in such cases in his own discretion and without being encumbered by the advice of the Federal Ministers. In any other federation, matters like these would have supplied occasions for reference to the judiciary. A particular Government might pass a law on an unenumerated subject, a citizen however, not satisfied with its authority to undertake such a measure, might refuse to obey it and thus compel the matter to be dragged into the proper judicial tribunal. The future course would have been decided by the verdict of this court of

justice. In order however to avoid such litigation and the uncertainty which it may entail, the Government of India Act has conferred upon the Governor-General, who has been placed in a most independent position, the authority to allocate the function to this or that Government according to his discretion.

While such would be the division of powers and functions between the Federal Government and the provincial authorities, the States which will accede to the federation may not be exactly subject to this arrangement. It has been pointed out already that the Princes and their agents did not clearly appreciate the obligations which federation might entail in their case. Excepting in matters of foreign affairs and defence which are not now in their hands and which will be also reserved powers in the new regime, they at the start were unwilling to surrender irrevocably any powers and authority to the Federal Government. The idea in fact at the back of their mind was one of confederation and not federation. They would vest in the Federal Government control over certain functions but would at the same time retain their own jurisdiction over them. A law passed by the Federal Legislature with regard to these functions would not be automatically effective in the States. Such a law must first be accepted or re-enacted by the State Governments and then only it would take effect in the territories under their jurisdiction.* In other

* This was the original point of view of His Highness the Maharaja of Bikaner. See Proceedings of the Federal Structure Sub-Committee (12th Nov., 1930—19th Jan., 1931), pp. 61-64.

words a law passed by the Federal Government in federal sphere would come into operation in a State only if the State Government would approve of it. This is what once became notorious in the U.S.A., as the doctrine of nullification which is absolutely inconsistent with the principle of federalism.

The first essential in a federal mechanism is that the Federal Government must be independent of the Governments of the federal units for the exercise of powers that are vested in it by the Constitution. The Federal Government must act, so far as its own duties and powers are concerned, directly upon the people of the States. The application of this principle would involve a definite and absolute surrender of certain powers and functions to the Federal Government. Such a surrender, however, was looked upon by the Princes as inconsistent with their ideas of sovereignty which they wanted to maintain intact. So it came to this that Their Highnesses wanted the federation to come off but at the same time they were unwilling to give up any portion of the sovereign jurisdiction which they happened to enjoy in their own States.

With such a background, it was inevitable that the problem of the division of powers between the Federal Government and the States authorities would not be ultimately solved in the right and proper manner. In the first instance it was out of the question that the States would be ready to limit their authority only to those powers and functions which the provinces would enjoy under the Act. It was absolutely clear that the States would flatly re-

fuse to part with their absolute jurisdiction over subjects which are enumerated in the third list. It has therefore been arranged that in respect of the provinces the Federal Government will exercise concurrent jurisdiction over these subjects. But in the case of the States they will be absolutely local in character. The Governments of the States will not share authority in this sphere with the Federal Government. Not only the States will not allow the Federal Government any jurisdiction over the subjects which are embodied in the 3rd list but they will have the right to reserve some of the functions enumerated in the 1st list also for their own exclusive or partial jurisdiction. *Vis-à-vis* the provinces the Federal Government will enjoy exclusive and absolute jurisdiction over all the subjects which are included in this list. But *vis-à-vis* the States this jurisdiction will certainly not be all-pervading.

It may be taken for granted for instance that a number of States will not surrender their control over their own postal arrangements to the Federal Government. Sir Akbar Hydari, the delegate of the State of Hyderabad to the Round Table Conference, pointed it out, in no uncertain terms, that separate postal organisation was an emblem of sovereignty and an important source of income to his State and on either ground his Government would be unwilling to surrender this privilege to the Federal Government. With respect to mint and coinage, as also with respect to the railways similar objections to the surrender of existing authority were raised in the Conference. Internal customs also were an important source of revenue

to some of the States which were consequently unwilling to forego their jurisdiction and authority in this field and surrender them to the Federal Government.

Nothing, it is true, creates greater heart-burning and jealousy between one territorial unit and another than customs barriers. Before the establishment of the federal constitution in the United States of America, one state raised tariff barriers against another and this made their relations strained to a degree. It was really as an antidote to this impossible situation that the unity movement which culminated in the adoption of the federal constitution in 1789, was started with such enthusiasm. Under this constitution customs duties were withdrawn out of the hands of the states and vested in the Central Government. The Gordian Knot was thus cut and the source of rivalry removed. In Australia also before the federal constitution was set up in 1901, the different colonies had the right to impose customs duty on their own account. The exercise of this right irritated so much their mutual relations that the framers of the federal constitution in one of their early conferences declared that if federation was established on the basis of separate tariffs, it would become a weak and rickety structure and might collapse at the slightest shock. "To my mind," observed Mr. James Service at the Melbourne Conference, "a national Government without a uniform fiscal policy is a downright absurdity." Mr. Deakin, another delegate to this Conference, was also of the same opinion. "A common tariff," he

agreed " is the *sine qua non* of national life. There can be no union which does not include a customs union." * But some of the Indian States, impervious to this experience, would come into the federation only on the condition of their still enjoying the privilege of internal customs.

So it is certain that the States which will enter the federation will not only continue to enjoy exclusive jurisdiction over all the subjects which are for the provinces in the concurrent list, but they will retain partial or full authority over some of the subjects which in respect of the provinces are in the exclusive federal list. Of course it is open to His Majesty under Section 6(4) of the Statute to refuse to accept any Instrument of Accession signed by the Ruler of a particular State, if He finds that the Ruler has sought to retain for his State Government too much of authority and jurisdiction in the exclusive federal sphere. The exercise of this right on the part of His Majesty may make impossible the undue whittling down of federal power in the States, but it is unlikely to prevent the reservation of some of the vital functions for local jurisdiction.

So the division of power between the Federal Government and the Governments of the units will not be uniform in all cases. So far as the provinces are concerned, all of them will have of course the same ambit of authority. But the Federated States will not, all of them, have the same powers and jurisdiction. Every one of them will of course wield

* Correspondence relating to the Federation Conference in Australia (C. 6025), p. 10.

greater authority than an autonomous province of British India. But amongst themselves some will have greater powers and wider jurisdiction left to them. In this respect the Indian federation will have a parallel in the old German Empire which was set up in 1871 and continued up to 1919.

The Federation of India will be as diversified a mosaic as that Empire was. Some of the States in the latter union had to be given special privileges and rights in order that they might be persuaded to enter the federation. Bavaria and Wurtemberg had to be conciliated with some " reserve rights " which related to the organisation and command of the army and to the administration of the railways, posts and telegraph. Along with Saxony they were also given the right to receive envoys for the transaction of purely local affairs, and to retain their own foreign legations.* Inspite of these concessions of a special character granted to these States, the federation worked smoothly to all eyes and gradually became more and more strengthened.

But on this account the German Empire need not be an example to the framers of constitutions in other countries where the circumstances may not be otherwise so favourable as they had been in Germany. In fact the conditions in this country were peculiar. Prussia, already a big and powerful state, became larger and more powerful still by the absorption of the territories of a few more states as a result of the war of 1866. When the imperial fabric was created in 1871, Prussia became by far

* W. H. Dawson, *The German Empire*, Vol. I, p. 374.

the most predominant partner. Its position in the federation can be correctly gauged by the fact that out of 397 members of the popular house of the Diet, Prussia alone had 236. In fact a distinguished writer once characterised the German federation as a " compact between a lion, half a dozen foxes and a score of mice."* Inspite of the concessions granted to the foxes, they could not disturb the household which was managed practically by the lion according to its lead and light. The concessions proved only honorific and innocuous in practice. In the Indian federation, however, there would be no predominance of one particular partner. Secondly, the number of foxes will be too large in the federation to allow their special concessions to become illusory in character. Only if the Governor-General who will be occupying the pivotal position in the federal mechanism work with one motive of strengthening and solidifying the union. the federation may hold together and grow to its full stature.

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* A. L. Lowell, *Government and Parties in Continental Europe*, Vol. 1, p. 246.

CHAPTER XII

Relations between the Centre and the Units

It is the first principle of federalism that the two Governments in a federation should be independent of each other. In the U.S.A. and Australia the Federal Government has been granted no statutory power to turn down any law which a State Legislature may pass in the discharge of a duty vested in it by the Constitution. Full legislative autonomy for each state is an important feature of the relationship between the federal and the state authorities. In Canada however this principle was not accepted by the fathers of the federal constitution. It has been pointed out in a previous section how they were frightened by the disruptive tendencies of the federal system of the U.S.A. By way of avoiding these tendencies in the fabric which they were constituting, they decided to interpose a central check upon the legislative autonomy of the provinces. In the British North America Act there is accordingly a provision* that the Dominion Government will be entitled to veto at its discretion a law passed by a provincial legislature. For over three decades, the Dominion Ministry took this duty very seriously and vetoed provincial legislative measures right and left. In fact we are told by a competent critic† that the provincial legislatures

* Section 90.

† W. R. Riddell, *The Constitution of Canada* (1927), p. 98.

were treated almost as municipal or county councils and they were hardly regarded as autonomous bodies. Since the war however public opinion has worked consistently against any interference in the legislative affairs of the provinces by the Dominion Government. Hence although the statute made a provision for central interference in provincial legislative projects, public opinion has now placed Canada practically on the same footing as Australia and the U.S.A. The Government of India Act, 1935, has also made the provincial legislatures independent of the control of the federal executive. The latter has been awarded no right to veto any provincial law. Of course the Governor-General has been invested with such authority in some cases,* but this authority he is to exercise not as a part of the federal executive but really as the representative of the King and the head of the administration in India.

In respect of the laws on those subjects over which the federal and provincial authorities have been awarded concurrent jurisdiction, the provision of the Government of India Act is practically on all fours with the arrangements in vogue in other federations. It† tells us that if both the authorities pass laws on any of these subjects, and if they are in conflict with each other, the provincial law will be automatically superseded and the federal law will become operative. But a situation more complex may arise. A federal law may exist on any sub-

* Sections 75 and 76.
† Section 107(F).

ject of concurrent jurisdiction. A provincial legislature, however, may all the same pass a bill inconsistent with this law. This measure instead of being assented to or rejected by the Governor of the province may be reserved by him for the consideration of the Governor-General or by the latter for the signification of His Majesty's pleasure. Now in case either the Governor-General or His Majesty assents to this bill and thereby gives it the dignity and sanctity of law, how will the situation be met? The new provincial law will not become inoperative, although it is inconsistent with, and repugnant to, the provisions of an already existing federal law. In this case so far as that province is concerned it is the federal law that will be for the time being superseded. The federal legislature will have however the privilege of legislating afresh on the subject but in view of the existence of the provincial law which has been placed on the statute book with the assent of the Governor-General, a member must receive his previous permission before introducing any such measure in either house.* Just as again when a federal law and a provincial law on a subject of concurrent jurisdiction are in conflict with each other, the latter is as a rule superseded and the former becomes effective, so also if any provision of a Federated State law is repugnant to a federal law on a subject as to which the Federal Government has jurisdiction over that State, it is the federal law that will prevail and that particular provision of the State law will become inoperative

* Section 107(2).

in that territory.* This provision has been embodied in the Act only to make it impossible for the Governments of the States to withdraw with one hand from the Federal Government the control over a subject which it has already delegated by the other hand to this authority.

It is not enough that the Federal Government should have legislative authority alone in respect of the functions which are assigned to it. It is of course good that the Act has made adequate provisions for protecting a Federal law from the invasion of a rival or competing law of a Province or a Federated State. But it is equally essential that once this Federal law is passed, there should be proper arrangement for its execution with the necessary vigour and in the right spirit. To this end it is necessary to secure the co-operation of the local authorities. If the latter are obstructive and even indifferent, the Federal Government will find it hardly possible to execute its laws in any satisfacfactory manner. The provincial executive need not necessarily be the agency of the Federal Government for this purpose. But even if the latter has an agency of its own to give effect to its laws, the co-operation of the Provincial Government is all the same indispensable in many matters. It is this conviction which has dictated the insertion of several sections in the Act.† These sections lay down that the executive authority of the provinces and the Federated States should not be so exercised as to

* Section 107 (3).
† Secions 122, 126, 128.

impede and prejudicially affect the operation of a federal law. On the contrary, the exercise of this authority should be such as to secure due respect for it.

The local executive may not be obstructive and on the other hand may do everything to ensure proper respect for a federal law. But this does not dispose of the question of the executive agency of the Federal Government. In the U.S.A. the Federal Government is not dependent upon the authorities of the States for the execution of its laws. It is not through the agency of the States that a federal law is enforced. The Federal Government has had from the start a machinery and agency of its own to give effect to the measures which the Congress would pass from time to time. In the Commonwealth of Australia also, the Federal Government is largely independent of the State authorities for enforcing its laws. Its experience has been unhappy in the spheres in which it has been dependent upon the executive of the States for this purpose. The agents of the State Governments discharged this federal responsibility inefficiently and in some cases evaded it altogether. The Federal Government has been compelled on this account to appoint its own agency in all cases to secure due and proper execution of its measures.*

It has been a tendency in India also for the Central Government to create agencies of its own in every sphere in which it exercises direct and

* A. B. Keith, *Responsible Government in the Dominions*, Vol. I, pp. 649-60.

original authority. In the department of Income Tax, for instance, before the introduction of the Montagu-Chelmsford reforms, it was the practice with the Government to collect the tax through the revenue agents of the provincial authorities. But as under the Act of 1919 division of functions became more or less definite between the two Governments, the Central authority thought it right and proper to create a machinery and agency of its own for enforcing Income Tax laws. In the provinces it will be as a rule unlikely therefore that in the new regime the federal laws will be left to the Provincial Governments for execution. Usually the Federal Government will have surely its own agency for giving effect to its laws and policies. But exceptional cases may naturally arise, in which it may be necessary for the Federal Government to entrust to the Provincial Executive the duty of executing a federal law. To this end Sec. 124 of the Act has conferred authority upon the Federal Executive and the Federal Legislature to call upon the provincial authorities to undertake the execution of federal measures. Of course when a particular Provincial Government will take up such responsibility, it will naturally be required to go in for some extra expenses. The money thus spent the provincial Government will be entitled to realise from the Federal Government.

In the territories of those States which will accede to the federation, the execution of the federal laws will become a more difficult affair. The Federal Executive may of course, with the consent of a Ruler, delegate to him the duty of executing any

federal law in his territory. But the problem will not really be one of voluntary delegation of such duties by the Federal Government to the authorities of the States. The danger is that the Princes will be averse to the creation of federal machinery and federal agency in their States. In the Round Table Conferences the Princes declared themselves on many occasions against the administration of federal laws in their territories by federal officers. They might be somehow reconciled to the passing of laws and the enunciation of policy by the federal authorities but they could not be reconciled to the execution of these laws and policies in their States by the agents of the Federal Government. It was their opinion that actual administration was a greater symbol of sovereignty than the passing of laws. To the popular eye the man who executed the policy was a greater sovereign than one who merely laid down the law. The Princes, therefore, might be willing to accept legislative limitation upon their sovereignty but they would stand up against the withdrawal of their control from over the administrative officers. It was demanded, for instance, on their behalf that the sea customs might be a federal subject and the policy under this head might be enunciated by the Federal Government but the actual administration of the policy so far as the States were concerned must be left to local officers.*

There is no question about this that in the Instruments of Accession the Rulers of the States

* Sir Pravasankar Pattani, the Minister of the maritime state of Bhavanagar, was an enthusiastic exponent of this point of view in

would not usually surrender the administrative functions as referred to in the previous paragraph to the Federal Government. That this will happen has been clearly hinted in Section 125 of the Act. Under this section an agreement will be arrived at between the Governments of the Federated States and the Federal Executive as to the administration, in these States, of federal laws by the Rulers themselves and their officers. By this agreement certainly the Rulers will undertake to maintain a sufficient establishment consisting of officers of requisite qualifications for this purpose. How far this dependence of the Federal Government upon the local agencies will make for proper and efficient administration, it is difficult to say at this moment. Only a few years of experience may reveal the result of the experiment. But this much should be pointed out here that administration is not a minor part of the work. The strength of a law depends considerably upon the way it is administered. In matters of customs duties the administration is certainly more important than the mere enunciation of policy. The efficiency of a customs law depends absolutely upon the way that it is enforced. It is essential on this account that the authority which lays down the conditions under which goods are to flow in and out should be responsible also for enforcing them. But in the ports of the States which will accede to the federation, the Federal Government will be nobody. The State customs

the Round Table Conference. See the Proceedings of the Federal Structure Sub-Committee (1930-31), pp. 111-12.

officers will surely look not to this Government but to the local Rulers for orders and guidance.

The Governor-General has been empowered by the Act* no doubt to satisfy himself either by inspection or by other requisite methods that the arrangements made by the States for these executive purposes are efficient and satisfactory. If he thinks them to be unsatisfactory, he may issue such directions to the Rulers concerned as he may consider expedient. This power the Governor-General will, of course, exercise by himself and in his discretion and in this matter he will be guided by no advice of the Federal Ministers. So ultimately it depends upon the tact, enthusiasm and vigour of the Governor-General whether the federal administration in the territories of the States will be lax or efficient. This arrangement is not quite an ideal one. It is not even quite a satisfactory one. But for the period of transition it has to be accepted. It should however be regarded in every circle as definitely a temporary one. The arrangement must be revised as opportunities occur and as unifying sentiment of the Rulers develops with the passing of years.

The Constitution Act has assigned to the Governor-General a position that is crucial and is almost vital. It is he who will decide as to the allocation of a function which is not enumerated in any of the three lists already mentioned. It is again for him to see that the Princes and their Governments properly discharge their duties in res-

* Section 125(2).

pect of the administration of federal laws in their territories. But although the Governor-General will occupy a pivotal position in the frame-work of the federation, he cannot be, in the nature of things, the ultimate guardian of the federal constitution. It is not for him to interpret it authoritatively whenever disputes will arise as to the proper meaning of its provisions. It is not for him also to protect the constituent units from the subtle encroachment upon their spheres of authority by one another. In most of the federations such guardianship is rightly vested in an independent court of law. In the United States of America the Federal Supreme Court holds the balance even between one unit and another. In case one of them oversteps the limits fixed for it by the Constitution, this court may, as a result of a case duly brought before it, rectify the position.* In the Dominion of Canada this function of maintaining the federal balance and the line of demarcation of authority between one unit and another has been most efficiently discharged by the Judicial Committee of the British Privy Council.† Similarly in Australia, a High Court was set up by the Commonwealth of Australia Act as the watchdog of the federal system.

It was imperative that the inauguration of the federal constitution in India should be similarly ac-

* "Our courts are the balancing wheel of our whole constitutional system." See Woodrow Wilson, *Constitutional Government in U.S.A.*, p. 142.

† There is of course a Dominion Supreme Court (set up in 1875), but most of the important cases have been finally decided by the British Privy Council.

companied by the establishment of a proper judicial authority. The Judicial Committee of the British Privy Council is too distantly located and burdened already with too much of work to hold original jurisdiction in this sphere. There was the necessity of an independent court to be located somewhere in India for this purpose. The Federal Structure Committee of the Round Table Conference was definitely in favour of the establishment of such a court. In the White Paper accordingly a proposal to this effect was made and the Government of India Act, 1935,* provides for the establishment, constitution, functions and powers of a Federal Court which has now been established at Delhi. The Constitution of this Court will be dealt with in some detail at a later stage of the book. Here it suffices to say that it is quite an independent body.

If any dispute occurs between one federal unit and another or between any such unit and the Federal Government, it will be a subject of original jurisdiction of the Federal Court. Of course it should be known that this dispute must be of a constitutional nature. It may be connected with the interpretation either of the Constitution Act or of an Order in Council made under it. It may arise also out of the interpretation of an Instrument of Accession as to the extent of legislative or executive authority vested by it in the Federation. Further any such dispute may emerge from an agreement made between the Federal Government and the authorities of a Federated State in the matter of

* Sections 200 to 218.

the administration of federal laws in that territory. It is for the Federal Court alone to entertain cases of such disputes and decide them by a declaratory judgment.*

In the United States of America many of the famous constitutional cases arose out of the disputes between individual citizens and the Governments. The Federal Government might have passed a law but as it was being put into operation an individual citizen might refuse to obey it on the ground that the law was *ultra vires* of the Constitution. The matter would now be dragged to the Federal Court and its judgment would settle it this way or that. In the United States, it should be known, there is not only one federal court. There is quite a number of such courts headed by the Supreme Court. The district federal courts are easily accessible to the people and consequently no individual citizen, who may dispute the validity of a federal law, finds much of a difficulty when he has to appear before a federal court.

But in India the Federal Court will be for most people a distant institution almost inaccessible to them.† Consequently an individual citizen who questions the validity of a federal or a provincial law, may be required, in the first instance, to appear before an appropriate provincial court. From this court, of course, the case may proceed on appeal to the Federal Court. As for the citizens of the States, their position may or may not be the same as that of a provincial citizen. In some of the States the

* Section 204.

† Of course this Court may hold its sitting in places outside Delhi.

citizens have been given the right to sue their Government. But in other States they are still debarred from this privilege. Consequently, even when they will find a particular law, local or federal, to be inconsistent with the provisions of the Constitution Act, they will have no opportunity of questioning it. In those States where the citizens enjoy this privilege they will, of course bring the matter first before the proper State Court and from there the case may be carried on appeal to the Federal Court. So in constitutional cases, the original jurisdiction of the Federal Court will be confined only to those cases in which the parties will exclusively consist of the Provincial, State or Federal Governments. Otherwise its jurisdiction will be of an appellate character. Its decision will not be final in either case. If a party is not satisfied with its judgment, it may appeal to the Judicial Committee of the Privy Council which will be the highest court of appeal in all cases arising out of the interpretation of the Constitution.

CHAPTER XIII

FEDERAL LEGISLATURE

The Federal Legislature will be a bi-cameral body. The lower house will be known as the House of Assembly or the Federal Assembly and the upper house as the Council of State.* The bi-cameral character has been dictated both by the tradition which has been created in India since 1921 and by the precedents of other countries. The Legislature almost everywhere consists of two houses on the age-old ground that decision by one house may be hasty and rash and should on that account be revised calmly by another chamber. The Central Legislatures in Federal Unions again are invariably bi-cameral on the special ground that one house is to represent the nation and the other house is to represent the units. The lower house is to enshrine the national idea and represent and uphold national interests, while the upper house is to enshrine the federal idea and buttress the interests of the federal units as such. Bi-cameralism in a Federal Legislature is thus taken as the inevitable result of the compromise between national and local forces, which is accommodated in the constitution.

Now whatever may be the theoretical justification of an upper house, actually in these days it is

* Sec. 18.

uncalled for on either ground. In countries where the executive is responsible to the legislature and consequently leads the latter in all legislative projects, a Bill is the fruit of much discussion and considerable labour both on the part of statesmen and on the part of experts. Consequently when it goes out of the lower house after passing through several stages of discussion and scrutiny, the revision by another house becomes a superfluity. In some of the notable federal unions again, the upper house has been constituted increasingly by party men who look to public questions in the same light as their political friends of the lower house and consequently if the popular house does not guarantee the rights of the federal units, the upper house also does very little in this direction. Nor is the theory that the upper house protects the interests of the small states quite tenable now. In none of the Senates* there has been a division in recent times absolutely on state lines. That the second chamber in the federal legislature is the special protector of the interests of the states is therefore not true in these days. If the American, the Canadian and the Australian Federations still remain intact, for this not the Senates but the Constitutions and their guardians, the law courts, are responsible.

Really speaking in the federal legislature there is little occasion for raising the question of the rights of the states. This legislature is concerned with making laws on the subjects which have already

* See Lindsay Rogers, *The American Senate*, pp. 99-100.

been handed over to the Federal Government and over which the federal units are not expected to have any control. Consequently in this sphere there is no question of violating or protecting the interests and rights of the states. In case the Federal Legislature trespasses on the reserved field of the states, there is the Federal Court to rectify the situation and restore to the units their ground which has been encroached upon. But the framers of the federal constitution of India did not entertain the idea of profiting by the experience of other countries. They thought it wise to cling to the tradition however empty it may now be and provide for a double-barrelled legislature in the Federal Government of India.

But while the framers of the federal constitution of India followed the age-old practice in making the federal legislature a bi-cameral body, they followed the precedent of no country in determining the constitution of the lower house. This chamber will consist of two hundred and fifty members of British India and hundred and twenty-five members, at the maximum, of the States. So the maximum strength of this house will be three hundred and seventy-five. Now the first departure from the precedents and traditions of other countries consists in the proportion of membership between the States and British India. In all the different federations the lower house of the federal legislature is constituted on the basis of population. Now all the Indian States together contain twenty-three per cent. of the total Indian population. All the same however their proportion of seats in the Federal

Assembly will be thirty-three per cent. If the example of other countries was followed, the representatives of the States in the house would have been less than 100 in all but actually they have secured one hundred and twenty-five seats.

The second departure from established traditions consists in the way that the representatives of the States will be returned to the Federal Assembly. There is no other federal lower house to which all the members are not returned by popular election. Even the members of the Reichstag of the old German Empire were everywhere elected by popular constituencies. There was nowhere a greater prejudice against democracy and popular control over public affairs than among the Prussian Junkers. But even they had to be reconciled to the principle of popular election. The Rulers of the Indian States however have set their face definitely against this system and succeeded in retaining for themselves the right of nominating their quota of members to the Federal Assembly.*

The third departure from the traditions and precedents of other federal unions consists in the method of election which has been adopted for the return of the provincial representatives to the Federal Assembly. They will not be returned directly by popular constituencies but only indirect-

* So far only the Government of Mysore has announced that its representatives will be popularly chosen. As against this attitude of the State of Mysore, there is the demand on the part of some states that not only their representatives should be appointed by their Governments but they should not even hold a fixed tenure. They should hold their membership during the pleasure of their Rulers.

ly by the provincial Legislative Assemblies. The principle of election to the Central Legislature has been a subject of controversy since 1918. In this year Mr. Montagu and Lord Chelmsford in their proposals for constitutional reform expressed their preference for a system of direct electorates. But they at the same time appreciated the fact that " the immensity of the country makes it difficult." They felt that " it may be impossible to form constituencies of reasonable size in which candidates will be able to get into direct touch with the electorates." They recommended the appointment of a suitable committee to decide this question.* Accordingly the Franchise Committee under the chairmanship of Lord Southborough was appointed and submitted its report in February 1919. It found it " impossible to recommend " direct election to the Indian Legislative Assembly by constituencies which would inevitably consist of about 90,000 electors and which would cover an area " of corresponding magnitude." It therefore suggested " indirect election for all general and communal seats by the members of the provincial Legislative Council."† The Joint Select Committee to which the Government of India Bill was committed turned down this proposal and modified the Bill in this aspect. It recast the relevant section in favour of direct election. Consequently under the Government of India Act, 1919, elections to both houses of the central legislature have been direct.

* Report, para. 273.
† Report, para. 34,

The Simon Commission which reported in 1930 was not however in favour of maintaining this arrangement. It wanted to go back upon the tradition of direct election, which was already being shaped in the country, and to revert to the system of indirect election which had prevailed during the period of working of the Morley-Minto reforms. The main argument of the Commission for coming to such a conclusion was not convincing at all. It observed that as there should be a federal union in India among the provinces and the states, it was desirable that in the Federal Assembly the provinces should be represented as such. If the members of each province were returned to the Federal Assembly by the provincial Legislatures, an emphasis would be placed thereby upon the fact that they were the representatives of the corporate interests of the provinces.* While expressing such an opinion the Commission ignored the fact that in no federal union the units were represented as such in the lower house of the federal legislature. It is not unnatural therefore that the recommendation of the Simon Commission was not well received by any important section of the British Indian people. The Government of India also seemed to be opposed to this proposal of the Simon Commission.†

The Indian Franchise Committee which was appointed in 1931 under the chairmanship of Lord Lothian and submitted its report in the following

* Report, Vol. II, p. 117.

† Despatch on the recommendations of the Simon Commission, pp. 122-124.

year failed, after a careful investigation and sifting enquiry in this country, to see eye to eye in this matter with the Simon Commission. It was true that the constituencies were vast, voters were scattered, approach to them was difficult and consequently relation between them and the candidates could not be intimate. But vast constituencies were not the special feature of democratic development in India alone. In the U.S.A. the senators were elected by a constituency which was conterminous with the whole of a state. The State of New York with its population of over twelve million and an area of over forty-nine thousand square miles constituted one constituency for electing two federal senators. Vast constituencies were therefore by no means unique in India. Besides, in this country as the number of elected members to the central legislature would be considerably increased in the new regime, the vastness of the constituencies would be correspondingly reduced. Secondly, with the growth of transport facilities, with the development of broadcasting and with the expansion of education, the problem would become more and more manageable in the future. Consequently the Committee reported in favour of maintaining the existing arrangement of direct election.*

In the White Paper also it was proposed that the system of direct election would be maintained. But as the Bill which included this proposal, was submitted to the Joint Committee, it was modified

* Report, Vol. I, pp 159-60.

by this body in favour of the indirect system. It quoted part of a sentence from a passage of Edmund Burke, explaining the relations which, in his opinion, should subsist between the voters and their representatives. " It ought to be the happiness and glory of a representative " so ran the quotation, " to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents; their wishes ought to have great weight with him, their opinion high respect and their business his unremitting attention." The Committee thought that no such excellent relationship was possible between a member of the Federal Assembly and his vast and far-flung constituency. But as without such relationship representative government was but a mockery, it was desirable that the system of election should be changed and the direct arrangement should be replaced by an indirect system.*

It is true that communication between a representative and a large body of his electors has not yet become very common in this country. But otherwise the relations between them cannot be declared to be in any way undersirable. They may fall short of the ideal which Edmund Burke once embodied in so excellent language but they are not really as bad as they are sometimes represented to be. The Indian representatives may not be purchasing umbrellas and securing the services of wet

* Report, Vol. I, Part I, p. 110.

nurses for their constituents* but all the same they usually do their best to act in consonance with their opinions and ideals and act up to their wishes and demands.

But the opinion expressed by the Joint Committee prevailed and the amended proposal was embodied in the Bill and submitted to Parliament which accepted it as it stood. While however the indirect system of election for the Federal Assembly was maintained by both the houses of Parliament it was modified so far as the Council of State was concerned. The Simon Commission which recommended indirect system for the Federal Assembly was logical in recommending the same method for the Council of State as well.† In the White Paper also the proposal was for making the elections to the Council of State indirect by the provincial legislatures. The Joint Select Committee approved of the indirect principle though in details of the arrangement it made its own recommendations. But when the Government of India Bill containing this provision was placed before the House of Lords, it was amended in this particular and direct election by constituencies roughly of the existing type was substituted. The Secretary of State, Lord Zetland, accepted this amendment and it was agreed to by the House of Commons. The arrangement therefore became more anomalous still. The lower house will be indirectly elected but the upper house which

* The French Deputies were found by Lord Bryce engaged in such pleasing duties. *Modern Democracy*, Vol. 1, p. 281.

† Report, Vol. II, p. 126.

will be a permanent body and will not be subject to dissolution will be, so far as the British Indian portion of membership is concerned, directly elected. This constitutes another departure of the framers of the Act from the precedents and traditions of other countries.

The Federal Assembly as pointed out already will consist of two hundred and fifty members from British India and one hundred and twenty-five from the States if all of these latter accede to the federation. The procedure of their choice and their allotment to different units are determined by the provisions of the 1st schedule to the Act.* The Federal Assembly will be a body constituted by the representatives of different religious, social, racial and economic interests. It should be pointed out here that the representatives of the different interests who met at the Minorities Sub-Committee of the Round Table Conference failed to come to any definite understanding with each other on the question of the allocation of seats in the legislatures to different communities and interests and on the method of their election. So no decision was arrived at either with regard to the joint or separate electorates or with regard to the proportions of membership. When all discussion on these subjects proved abortive, the matter was referred to Mr. Ramsay MacDonald, then Prime Minister, for arbitration. There is a controversy if the representatives of all groups in the Conference agreed to the suggestion of arbitration. But anyway the head of the British Cabinet

* Under Sec. 18(3).

took up this question and decided it after necessary references to the Governments in India.

His decision is commonly known as the Award of the Prime Minister. In this Award, he not only provided for separate electorate for Mahomedans. Europeans and several other groups but he provided for it also in case of the members of the scheduled (depressed) castes. The caste Hindus and members of the scheduled castes would have separate electorates and through them separate representatives in the legislatures. The Award gave rise to an acrimonious controversy in India. The Mahomedans as a rule of course we'comed it because of the fact that it had conceded to them separate electorate and considerable weightage in the provinces in which they were in a minority.. But the Hindus opposed it on the grounds that by separate electorate it would subvert the nation-idea in India and divide the Hindu community into twain. In some parts of the country the Hindus were also aggrieved on the ground that they did not receive the amount of representation which they regarded as their due by every consideration. But that part of the Award which sent iron into the soul of Mahatma Gandhi was the one concerned with the representation of the scheduled castes. In the Yerbada prison where he was lodged at the time, he went on a fast, which, he declared, would be one unto death if meanwhile the principle of separate representation for these Hindus of the scheduled castes was not abandoned. Ultimately of course a compromise was arrived at to the effect that the non-caste Hindus would have reservation

of seats in the different legislative chambers according to a schedule but their fixed quota of members would be returned by electorates composed of Hindu voters of both wings. Of course preliminary to this election, four candidates for each reserved seat of the scheduled castes would be elected by the voters of these castes alone. It would be only in the final stage of the election that joint electorate system would be at work. Although the principle of joint electorate was thus considerably watered down, it had to be accepted by Mahatma Gandhi. And as the Pact was thus effected between him and the leaders of the depressed classes, the new agreement was accommodated in the Award of the Prime Minister.

In the chart provided in the Appendix are given the lists of members allotted to different provinces and to their different groups. Here it suffices to say that the method of election which is provided for in the Act is not only indirect but is less liberal still than the system which was proposed by the Simon Commission. It was the opinion of this Commission that different communities in a province would have no reserved seats in the Federal Assembly but the provincial quota would be elected by the provincial assemblies by the method of proportional representation.* This would indeed secure due representation for every community but separate election as such would not be adopted. But this principle was abandoned by the Joint Committee when it set its face against the principle of direct election and

* Report, Vol. II, p. 118.

adopted the idea of indirect election for the Federal Assembly. It recognized no doubt the fact that if the provincial assemblies returned members to this body by the method of single transferable vote, the different communities would have secured their due share of the distribution of seats in the Federal Assembly. But the interests of commerce, labour and landlords would have suffered and the communities which demanded separate representation would have also looked upon this system with suspicion and disfavour. The Committee accordingly recommended that the Hindu, Mahomedan and Sikh seats in the Federal Assembly "should be filled by the representatives of those communities in the Provincial Assemblies voting separately for a prescribed number of communal seats."*

As for the representation of the depressed classes, some special arrangement must be made within the Hindu group for their securing the right type of representation. It was decided that all the Hindu members of the Provincial Assembly would return by single transferable vote all the Hindu representatives of the province to the Federal Assembly. But for securing due representation of the scheduled castes, a certain number of Hindu seats would be reserved for them. Not only again this quota would be fixed but for the return of this quota the Hindu members would not have the unrestricted right of choice. Candidates numbering four times as many as the number of seats to be filled would

* Report, Vol. I, Part I, pp. 110-111.

be elected by a primary consisting of all the depressed class candidates chosen for provincial elections. The Hindu members of the Provincial Assembly must limit their choice to these candidates of the scheduled castes. So the depressed classes would have not only a reserved quota of seats in the Federal Assembly but a definite number of candidates for election to these seats would also be in the first instance chosen by a college of their own accredited representatives. Only after such a choice was made the representatives of the caste Hindus in the Provincial Assembly would have a voice in the election to the Federal Assembly. The arrangement was thus not only complicated but could be characterised as election by joint electorate only by apology. For the return of Indian Christian, European and Anglo-Indian representatives, the Committee regarded election by the Provincial Assemblies as unsuitable and decided that they should be elected on an all-India basis. Their representatives in all the Provincial Assemblies should constitute electoral colleges and return in this capacity their fixed quota of representatives to the Federal Assembly.* The system chalked out by the Committee was bodily incorporated in the Act and that is the arrangement which will be in vogue, when the federation is in operation.

As it has been already pointed out, the indirect system of election for the Federal Assembly will be a novel arrangement inconsistent with the traditions of every modern democracy. The difficulties

* Report, Vol. I, Part I, Appendix II, pp. 129-30.

in the way of direct representation are no doubt many but as the Lothian Committee on Franchise observed these difficulties have to be faced in many cases by every large country organised on a federal basis. But if these difficulties were not allowed to stand in the way of adopting direct election in a country like the U.S.A., they ought not to have been regarded as insurmountable in India. Especially as for over one decade and a half experience was earned of the working of direct election, it should not have been thrown away so lightly at this time of the day.

The result of indirect election as provided for in the Act is also not expected to be very encouraging. The representatives in the Federal Assembly unconnected with the primary voters and lacking the bracing inspiration which may be derived only from this source may not be so confident and vigorous in their acts as they otherwise might have been. The blemish of the system is further aggravated by the fact that these representatives will be returned only by small groups of members of the Provincial Assemblies. In Bengal 10 Hindu members will be returned by an electorate which will not contain even one hundred persons. In U.P. again twelve Mahomedan members will be returned by a constituency containing little over sixty voters. In the Punjab similarly six Hindu members will be chosen by voters whose number will hardly exceed forty. Election by such small knots of voters has hardly ever been known to be clean and straightforward in any part of the world. Corruption can fail to creep into such elections only in exceptional cases,

and where corruption is not noticeable, canvassing may be resorted to in a form that, in ninety cases out of every hundred, must undermine the independence of the voters.

Those again who will desire to stand as candidates for depressed class seats will find their position more unenviable still. They must in the first instance approach the electoral college for the inclusion of their names in the definite number of candidates. In Bengal as there are thirty reserved seats in the local Assembly for these scheduled castes, there may be 120 candidates in the provincial elections and these 120 will constitute the primary for choosing the twelve depressed class candidates for the three seats reserved for them in the Federal Assembly. If of course there is little enthusiasm among the members of the depressed classes over the primary election, well and good. Otherwise it is likely that just to be included in the number of twelve candidates at least twenty may canvass for the support of the primary. When again this first round of the fight is over and the twelve candidates are chosen, they will be required to canvass the support of all the Hindu members of the local Assembly. Those three of them who will receive the highest number of first preference votes will alone be declared elected to the three reserved seats in the Federal Assembly. To this end they will be required to employ all their arts of persuasion and ultimately it is not unlikely that those with the longest purse and the most elastic conscience will alone come out with flying colours. It is surprising that a system which is so complicated and fraught

with so much evil was given benediction by the Joint Committee and embodied in the Act by the British Parliamentarians.

The upper house, the Council of State, will consist of one hundred and fifty-six members from British India and one hundred and four members from the States if all of the latter accede to the federation. In other words forty per cent. of the seats in the federal upper house is being reserved for the States. The original demand of the Princes was that on the model of the system in vogue in the U.S.A., the States and British India, as two federating units, should have equality of representation in the federal upper house. Actually, however, it was not British India as a whole which was entering into a federation with Indian India as a whole. It was the British Indian Provinces and the Indian States which were individually and severally to be regarded as federal units. Now as the areas and population of these units would differ as poles asunder and as in traditions and prestige also they would differ considerably from each other, it was unthinkable that all of them irrespective of their size, population and past history and traditions would have equality of representation in the federal second chamber. A State like Hyderabad would not surely agree to have the same representation in this house as the State of Benares.

The number of States also was so large as to preclude altogether the entertainment of any idea that every State should have its own mouthpiece in the upper house. And when the individual representation of every State in this body was not

feasible, it was unthinkable that one should have as much representation and as much voice in it as the other. Nor was such equality of representation conceded to the units in every federation. In the old German Empire, the different States had different degrees of representation in the Bundesrath. While Prussia had in it seventeen votes, Bavaria had only 6 and Baden 3.* In the Dominion of Canada also the provinces are not equally represented in the Senate. Quebec has far greater representation in it than Alberta or Prince Edward Island.†

Any way when equal representation was out of the question, some rough but not ungenerous allocation of seats should have been resorted to. In view of the fact that in the lower house the States were securing greater representation than what their population strength would warrant, justice would have been done both to British Indian provinces and the States if the same weightage was conceded to the latter in the upper house. Thirty-three per cent. in the lower house and the same proportion of seats in the upper chamber would have been an arrangement at once satisfactory and equitable. But the delegates of the States would not be content with it. They insisted on and received forty per cent.

As for the representatives of the States, they will all be appointed by their own Governments.

* Dawson, *The German Empire*, Vol. I, p. 384.

† Quebec has 24 members, Alberta 6 and Prince Edward Island 4 in the Canadian Senate.

Of the British Indian portion again six will be nominated by the Governor-General and the rest will be elected. As in the lower house, the elective portion here will represent the different communities and interests as such in the different provinces. For the election of Hindu, Mahomedan and Sikh members, territorial constituencies consisting of voters of these religious affiliations will be carved out. Every one of these communities in the different provinces will have their seats reserved and they will be filled by persons returned by voters* of these communities alone. Separate electorates for the election of representatives of different communities will in fact be the rule. As for the election of Indian Christian, European and Anglo-Indian representatives, the procedure will be the same as in the case of the Federal Assembly. They will be returned by electoral colleges consisting of representatives of these communities in the provincial legislatures. In case again a woman member is allotted to any province, she will be elected by the members of the provincial legislature.

The Federal Assembly will have a tenure of life for five years, unless of course it is earlier dissolved by the Governor-General.† At present the life of the Legislative Assembly is fixed at three years. The longer life of the Federal Assembly may appear to be on all fours with the British system.

* The qualifications of these voters will be high though they may vary from one part of the country to another and from one community to another.

† Sec. 18(5).

Since the passing of the Parliament Act of 1911, the life of the British House of Commons has been fixed at the maximum at five years. But it should be noted that actually no house has since the conclusion of the War lived the whole statutory period. The French Chamber of Deputies has practically a fixed life of four years. It cannot be dissolved earlier except with the consent of the Senate and this consent is seldom available. The tenure of life of the House of Representatives in the U.S.A. is only two years. So the life of the Federal Assembly in India will be longer than the life of any important lower house in the world. This may make for stability indeed and assure greater experience to the members. But this long life would have been more justifiable if the election to this house were direct. On the ground that the constituencies were vast and far-flung, the voters too many and too scattered and the election expenses too exorbitant and ruinous, the tenure of life of the Assembly might have been long. But in view of the fact that the members of this body will be returned indirectly, a long tenure of life might have been avoided. There is every risk of bad and unscrupulous men being returned to the Assembly under the arrangement that has been chalked out. It would have been better if their electors had opportunity of revising their opinion earlier and cashiering their unscrupulous representatives sooner. But because the provincial assemblies also have been awarded a tenure of five years, the persons whom they would elect have also been given the same tenure. Elsewhere however in this book, it has

been recommended that the life of the provincial assemblies should not be fixed at more than four years. And in conformity with that arrangement the tenure of life of the Federal Assembly may also be reduced by one year.

The Council of State will be a permanent body. It will not be subject to any dissolution. All its members will in time have a life of nine years at a stretch. But it will be so arranged, in order to maintain the permanent character of the Council and prevent all its members from completing their tenure of life at the same time, that one-third of the members will retire every three years. In order to give effect to this arrangement in the beginning some discrepancy will have to be made between the tenure of life of some members and that of others. One-third of the members will have to be elected only for a period of three years in the first instance and another one-third for six years. But as a period of six years will pass by, all the members returned henceforward will be elected for the period of nine years.

In nominating six members also, the Governor-General will follow the same principle and arrangement. He will in the first instance nominate two for three years, another two for six years and the remaining two for nine years. In the Dominion of Canada, the Senators hold a life tenure but they are not returned by election. They are all appointed by the Governor-General, of course on the advice of the Ministry of the day. As for the British House of Lords it need not be pointed out here that it is predominantly a hereditary body and now

constitutes a class by itself. Of the important elective upper houses it is the French Senators who alone hold office for the long period of nine years.* In the U.S.A. the Senators are elected for six years at a time and that is the case with the members of the Australian Senate as well. The framers of the Indian Constitution decided in favour of a long tenure of life for the members of the Council of State obviously in order that this arrangement might make for stability and sobriety.

The Statute has fixed the age which candidates for seats in the two houses of the Federal Legislature must attain. In this matter the arrangement which at present obtains with regard to the Legislative Assembly and the Council of State has been kept up and no alteration has been made therein. The candidates for seats in the lower house must attain twenty-five years of age and those for the Council of State must be at least thirty. The arrangement for the upper house is more liberal than the principle observed in France and is on all fours with the system in the U.S.A. In the former country a candidate for the Senatorship must have attained the fortieth year. But in the latter country, he must be only of full thirty years of age. The insistence on higher age in France was due to the fact that the framers of the Constitution wanted the second chamber to be truly a conservative and stabilising factor in the legislative mechanism.

* The members of the South African Senate of course enjoy a longer tenure of office still. They are elected or nominated for a period of ten years at a stretch.

The lower house would be elected directly by universal suffrage and might on that account be open to sudden gusts of passion. The second chamber therefore which was to be a check upon this passion must consist of persons who might be immune from it. It must be so constituted as to become in reality the Philip sober to which appeal might be made from Philip drunk. But in India the lower house will be indirectly chosen and consequently it is not likely to be open to sudden gusts of passion. The upper house therefore need not be always so conservative as a house consisting exclusively of aged men happens usually to be. Besides the persons who will be responsible for electing the members of the Council of State will be required to have such financial and other stakes in the country, that they are unlikely to return persons of a volatile character. It was therefore unnecessary that higher age for candidates should be insisted on for ensuring the conservative character of this house.

An important feature of the constitution of the different legislative chambers in India has up till now consisted in the nominated element. Both in the Legislative Assembly and in the Council of State constituted under the Act of 1919 this element prevails to a large extent. The nominated group again consists of two portions—official and non-official. The official group will be withdrawn completely under the new Constitution from either chamber, so far as British India is concerned. The nominated non-official group also will continue only in the upper house and that in

largely reduced strength. It will not be maintained in the Federal Assembly in any shape or form. " But while the principle of nomination to which the public in British India has been so much opposed will be abandoned altogether in this part of the country, the representatives of the States in both the chambers will be predominantly if not exclusively chosen by their respective Governments. In their choice the people will not usually have any voice direct or indirect. So the nominated element will disappear from the houses by one door and enter them with redoubled vigour and strength by another.

The public was opposed to the principle of nomination on the ground that the persons who owed their membership either to the favour of the Government or to their official position were not expected to have any independence of views and conduct. They had, as Mr. C. Y. Chintamoni once observed, to regard the Government House as their one constituency whose good will they were to cultivate and which they had to propitiate on all occasions. There was a time when the popular elective element had little place in the Council Chambers and the official members exercised considerable independence in their treatment of questions that came up for discussion and decision. The late Mr. R. C. Dutt, although a member of the Indian Civil Service, expressed popular views and voted with the popular element in the Bengal Legislative Council. Similar was the case also with many British Officers who refused to side with the Government on many important occasions and took lines of action of their

own. But with the lapse of time this independence ceased to be conceded to the official members, and the rule became enunciated that unless otherwise directed all of them were to vote with the Government.

As the officials lost their independence, the non-official nominated members also could not but fall in with the new principle of action. Their existence depended upon the good will of the Government and if they proved recalcitrant, there would be little chance of their coming back to the house, once their first term would expire. Consequently they usually voted with the Government. During the fifteen years of the working of the Montagu-Chelmsford reforms, the one nominated member in the Legislative Assembly, who is known to have acted always according to his convictions and voted independently of the wishes of the Government is Mr. N. M. Joshi. Possibly in his case this independence has been condoned because of the moderate views which he otherwise holds as a member of the Servant of India Society and also because of the fact that as a level-headed expert on labour problems he cannot easily be replaced.

As the official and non-official nominated groups constituted a phalanx which the Government might mobilise on all occasions against the elected members, the people looked askance at them and demanded their withdrawal altogether from the legislatures. Now they will actually disappear but this is not likely to improve very appreciably the position of the two chambers of the Federal Legislature. The representatives of the States will be

nominated by their Governments and will consequently be expected in most cases to do their bidding. Now in the lower house they will be 33 per cent. of the total membership and in the upper house they will constitute forty per cent. of the total strength. It is inevitable that certain members on the British Indian side will also be of conservative instinct and views. They will not fail to join hands with the delegates from the States and together they are likely to command the majority of votes. Against their combined strength therefore, the democratic and liberal element in the two houses will not be able to make any headway. It will not be easy therefore for any liberal legislative project to be accepted by the two houses. In both, conservatism will in all probability be securely enthroned.*

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* The Maharaja of Dholpur, the late Chancellor of the Chamber of Princes, actually advocated the formation of a conservative bloc in the Federal Legislature to support the vested interests.

CHAPTER XIV

RELATIONS BETWEEN THE HOUSES

In Great Britain absolute equality of power and authority has never been recognised between the two houses of Parliament. Not only money Bills have been all along initiated only in the House of Commons but the House of Lords has not ever enjoyed the right of amending these Bills. So even before the passing of the Parliament Act of 1911, the House of Lords was not equal to the popular branch of the Legislature in power and authority. But until the passing of this measure in this year, the upper house occupied an inferior position only in regard to money Bills. For other legislative purposes, it was practically on the same footing as the lower house. The Parliament Act however made the House of Lords distinctly inferior in every respect. Under some definite conditions even an ordinary Bill might now be passed into an Act without its approval.

For some time certain sections of the British public held the view that only the peculiar constitution and composition of the House of Lords could justify the relegation of the second chamber to such an inferior position. As soon as the upper house would be reformed and better constituted, it must be restored to its former position of equality in respect of ordinary legislation. But the Conference which met in London in 1917 and 1918 under the

chairmanship of Lord Bryce to consider the future of the House of Lords demurred to this view. The sense of the meeting was reported later on by Lord Bryce in a letter to the Prime Minister.* He pointed out in this document that the general opinion of the Conference was to the effect that only such powers and functions should be conferred upon a second chamber, however constituted, as might make it useful and serviceable to the state but would not on any account elevate it to an equal and co-ordinate position with the lower house.

A second chamber was to be set up, according to the opinion of the Bryce Conference,† in order that Bills introduced in and passed by the lower house might be minutely examined and revised by this body. This careful revision would remove the technical flaws from which a statute might not unoften suffer. Secondly, non-controversial Bills and Bills of minor importance and value might be introduced in the second chamber. They might be discussed threadbare by this body and put into a well-considered shape before they were passed on to the lower house. This would relieve to some extent at least the congestion of business from which the popular chamber was always expected to suffer. Thirdly, when a controversial Bill was passed by the lower house, the second chamber might interpose its veto and hold up the measure if it was convinced that the lower house had really no mandate from the people for undertaking such legislation. This veto however must be definitely

* Cd. 9038.

† *Ibid*, p. 4.

of a suspensory character. It was to be effective only for a specified period. Lastly certain general debates which for want of time might not be held in the lower house might be conveniently held in the second chamber.

The Conference over which Lord Bryce presided thus set its face definitely against the exercise of equal and co-ordinate authority by the second chamber, however constituted it might be. It was actually in favour of relegating it to a secondary role. The verdict of this Conference was accepted and confirmed by the framers of the post-war constitutions in Central Europe. The upper chambers in these countries, observe two distinguished authors, " are placed in a distinctly subordinate position. They are not only second but also secondary chambers. For the constitutional distribution of power is such that, while they may impede and delay they cannot ultimately withstand the determined will of the lower and popular body." *

It is again not merely in unitary and centralised states that the generality of opinion is against the exercise of equal and co-ordinate powers by the second chamber. In some of the real federal unions also the second chamber in the federal legislature has been relegated to a distinctly subordinate role. When the American federation was launched upon, the prevailing idea among the people was of course this that no measure should be passed into a law " without the concurrence first of a majority of the

* H. L. McBain and L. Rogers, *The New Constitutions of Europe* (1923), p. 38.

people and then of a majority of the states."* In other words a Bill before being placed on the statute book must have the approval of the house which represented the nation as well as of the house which represented the states as such. Both the houses should have equal voice in the matter. Accordingly the Senate was practically given the same legislative and financial powers as the House of Representatives. It was laid down of course that money Bills must originate in the House but they might be amended like any ordinary Bill by the Senate. Since the Senate was created with such powers about one hundred and fifty years ago, its authority has not been diminished by any unwritten convention or custom. Due to some other factors into the nature of which it is not necessary to enter here, it has rather become more powerful than the lower chamber. In the words of a distinguished student of the American Senate, it has become the "senior partner" in the congressional system.†

But though in the American federation the upper house enjoys powers equal to those of the lower chamber, in the Canadian and the Australian federations such co-ordinate authority is not exercised by the upper chamber of their central legislatures. The Canadian Senate has no doubt, under the British North America Act, 1867, the same powers as the House of Commons. But convention has deprived it, since its inception, of the right to

* *The Federalist*, No. 62.

† L. Rogers, *The American Senate* (1926), p. 4.

amend money Bills. The framers of the Dominion Constitution in fact wanted the Senate to assimilate to the status of the British House of Lords.* The latter at the time had under the law the same rights and privileges as the House of Commons. But by convention it was debarred from amending any money Bill. So the Canadian Senate also, though entitled under the British North America Act to exercise the same jurisdiction over money Bills as over other measures, had to forego its authority over the voting of taxes and the grant of supply. Otherwise also the Senate could not as a rule stand up as a rival against the House of Commons. It has been exclusively an appointive body while the House of Commons has consisted only of the elected representatives of the people. Automatically therefore the Senate has become far less powerful than the Commons.

When the Australian federation was being fashioned in the Convention at Sydney, there was a sharp difference of opinion among the members as to the financial powers of the federal upper house. "I do not see," observed Sir Henry Parkes, "how two bodies can have equal powers in dealing with matters which viewed, however they may be viewed, are admitted to be the most vital questions of civil government." But pitted up against this view of the father of the Australian federation was the opinion of another member, Dr. Cockburn. He took his cue from the American

* See the speech of Sir John Macdonald in the Canadian Parliament on Feb. 6, 1865. Kennedy, *Documents of the Canadian Constitution*, p. 607.

system and observed " the whole principle of federation is to recognise the co-ordinate power of the population and the states. There can be no federation if you give all the powers to the popular assembly."* Ultimately a compromise was brought about between the two opposing schools—a compromise which to all intents and purposes deprived the federal upper house of financial authority. It has been laid down in the Commonwealth of Australia Act that when a finance Bill, initiated in and passed by the House of Representatives, is sent up to the Senate, the latter may not amend any of its provisions. But if any such provision is not to its liking, it may suggest some alterations. But it is for the House of Representatives to accept or reject such suggestions. So in the financial field the Senate has been relegated by statute itself to a position inferior and subordinate.

The framers of the Government of India Act took no notice of the changes which have taken place during the last quarter of a century in the ideas of the European peoples regarding the powers and functions of a second chamber. Nor did they attach any importance to the position which the Senate happens to occupy in the legislative mechanism of Canada and Australia. They did not allow themselves to be guided by either when they settled the powers which the upper house of the federal legislature would exercise in India. Under the Government of India Act, 1935, the

* See Official Record of the Proceedings and Debates of National Australasian Convention, held at Sydney in March and April, 1891 (C-6466).

demands for grants must be first submitted to the Federal Assembly.* With this restriction the Council of State will have the same powers and privileges as the lower house. Its control over ordinary as well as money Bills will be the same as that of the Federal Assembly.

The Princes of the Indian States insisted on some sure barrier against radical legislation. If all of them acceded to the federation, they would have forty per cent. of the seats in the Council of State at their disposal. Of the 260 members of this chamber, 104 would be nominated by their Governments. The British Indian representatives also would be returned by constituencies of a select character. The overwhelming majority of this house was therefore expected to be always conservative in outlook and policy. If such a house was given equal legislative and financial powers, if in fact it could amend and mutilate at pleasure all Bills sent up to it from the Assembly, there would be little risk of any radical measure being passed. The upper house was therefore given the co-ordinate authority and the desired barrier against radical legislation was provided.

But such precaution appears to have been unnecessary. The Federal Assembly itself is not likely to be a very radical body. One-third of its members will be returned by nomination from the States and these members will therefore be in all probability as conservative as the Governments of the States may wish them to be. The British In-

* Sec. 34. By convention, as in the existing constitution, taxation Bills also may be first introduced in the Federal Assembly.

dian representatives also will not be directly in touch with popular suffrage and democratic fervour. They will be indirectly returned by provincial assemblies. Some of the members so returned may be in all circumstances expected to be definitely conservative in outlook and ideals. The other members also are likely to have their radicalism considerably diluted in the process of indirect election. There is very little risk of firebrands and levellers being returned in any considerable number to the Assembly. The measures passed by this body are therefore most unlikely to be revolutionary or even radical in character.

While as a precaution against the imaginary radicalism of the Federal Assembly, the Council of State ought not to have been invested with co-ordinate authority, there are several weighty grounds why it should have been at least in financial matters assigned only a subordinate part to play. Under the Montagu-Chelmsford reforms, it is for the Legislative Assembly alone to vote grants to the Government. The Council of State has no part or lot in the domain of supply. But the framers of the new Government of India Act have gone back upon this arrangement. In the new regime estimates of certain items of expenditure will not be submitted to the vote of the legislature at all. But the demands for grants which will be so submitted, will be placed before both the houses and the two chambers will have equal authority to assent or refuse to assent to them.* This will be an

* Sec. 34.

unfortunate deviation from a constitutional tradition which was solidifying in the country during the last sixteen years.

Secondly, the enjoyment of equal powers by the two houses will be a serious obstacle to the growth of true responsible government in the centre. The Federal Ministers will be required to hold their office during the pleasure of the legislature and run their departments in responsibility to this legislature. But if they are to be responsible at all, they may be so responsible only to one of the chambers. They cannot possibly serve both the houses loyally and faithfully at the same time. There is no mention in the Act as to the house to which the Ministers are to be responsible. In fact, there is no allusion in the statute to the question of Ministerial responsibility to the legislature. When the statute is so silent, it may be assumed that the Ministers will shape their policy and conduct the administration of their departments in full responsibility to the more popular and more powerful of the two houses. But as regards popularity, there may be considerable doubt as to which chamber will be more in touch with the wishes and aspirations of the people. In both the houses the delegates from the States will be the nominees of their Governments. As for the British Indian portions, in the lower house the members will be returned indirectly by the provincial assemblies and will not consequently be in intimate touch with the primary voters of the country. To the upper house however the British Indian members, except in a few cases, will be elected directly, though by

constituencies of a select character. In these circumstances one may be justified in assuming that the character of the one chamber may be almost as popular or as conservative as the character of the other. Then as regards powers and authority they will certainly be the same in the two cases. If in the voting of taxes and the grant of supplies, the upper house had less jurisdiction than the lower chamber, there would have been no difficulty for the Ministers to recognise their master. But situated as the two chambers will be, both of them are likely to have pretensions as to their control over the Ministers.

In this connection it will not be out of place to cite the experiences of the French executive. Of the two houses of the French Parliament, the Chamber of Deputies is the popular body *par excellence*. All the Deputies are directly elected by universal suffrage. The Senate is also an elective body no doubt; but the Senators are all returned by indirect election and are not therefore in direct touch with the primary electors. So there is no doubt as to which house is more popular than the other. As regards power also there is similarly little doubt as to which of the two houses exercises more of it than the other. Over money Bills the Senate has not the same jurisdiction as the Chamber. In the first place they have to originate only in the Chamber and secondly, although the Senate may reject them, its right to amend them is not recognised. In these circumstances it is but inevitable that the Ministers should regard themselves as accountable only to the Chamber. But while in

the Constitution it is laid down that the Ministers will be responsible to the legislature, there is no mention in this document of the particular house to which they will owe their responsibility. The Senate has caught hold of this loophole and demanded on occasions the resignation of the Ministers on the ground of their enjoying no longer the confidence of this body. Now if the French Senate which is less popular than the Chamber and enjoys less authority than this body may have pretensions of this character, the Council of State in India will have certainly more justification on its side to rival the Assembly in the matter of controlling the executive. Development of true responsible government presupposes the predominance of one chamber. The framers of the Government of India Act have only made the system complex and uncertain by preventing the possibility of such predominance on the part of the Assembly.

Equal powers for two houses have another serious defect in that if they disagree there may be deadlock in legislation and administration. In the United States of America " collisions between the two houses," observed Lord Bryce, " are frequent. Each is jealous and combative." * When each house is so prone to assert its authority and pursue its course and when each can stop all legislation, there is certainly the risk of a dislocation of the governmental machinery. That there has been no dead stop to all public business is due to this that both the Senators and the Representatives are

* *American Commonwealth*, Vol. I, p. 188.

elected by the people and are guided by the same public opinion. If there were no such "latent unity" between the two houses, disagreement might have been carried to extreme and absolute deadlock might have been the result.

The authors of the Government of India Act, 1935, had also the question of deadlock always in their mind. They knew it for certain that as the two houses of the federal legislature were being granted equal powers and authority, disagreement between them might be sometimes carried too far and might create deadlock in legislation and administration. They have therefore provided for a joint meeting of the two houses.* When there is such disagreement the Governor-General may ask the two chambers to assemble in a joint session and decide the question at issue by a majority of votes in this joint meeting. The one serious drawback of this arrangement will be this that while it will facilitate the passing of conservative and even reactionary measures, it will make it out of the question for a progressive measure to be put upon the statute book. The Council of State will be a citadel of conservative elements and the Federal Assembly also will have as its members a large body of conservative persons. Now even if a progressive measure secures the approval of the majority of members of the Assembly, it is most likely to be turned down by a clear majority in the upper house. If then there is a joint session, the conservatives in the two houses will have in all probability a stand-

* Sec. 31.

ing majority in this joint meeting and this majority will certainly kill the measure. Similarly again, a reactionary Bill passed by the Council of State may be rejected outright or amended in essentials by the Assembly. If it is then submitted to the joint session, it has the chance of being passed there in just the form that the reactionaries may determine.

Any way the arrangement would have been less cumbrous and more businesslike if the Council of State, instead of being elevated to a co-ordinate status, were relegated to a definitely subordinate role.

CHAPTER XV

Restrictions on the Powers of the Federal Legislature

The authority of the Federal Legislature has been subjected to certain restrictions even in the domain which is described in the Constitution Act as definitely federal. These restrictions are threefold in character. In certain matters the legislature has been prohibited from entertaining any measure unless previous sanction for its introduction has been obtained from the Governor-General. In certain other matters again the legislature has been definitely prohibited from passing a measure under any condition. Thirdly, under certain conditions laws may be passed and ordinances may be issued by the Governor-General on his own authority and over the head of the two chambers of the legislature. The latter are merely to look on while these laws are passed by the Governor-General.

In case a particular Bill repeals, amends or is repugnant to, a provision of an Act of the British Parliament which extends to this country, it cannot be entertained by the legislature without the previous sanction of the Governor-General. Similarly if a Bill is in any way inconsistent with the continuance of any provision of an Act of the Governor-General or any ordinance promulgated by him in his discretion, it can be introduced only with the

sanction of the Governor-General. This arrangement applies also to bills which affect matters in regard to which the Governor-General is required to act in his discretion. The previous sanction of the Governor-General must be received in case of the introduction of a bill which affects any Act relating to a police force or which is concerned with the procedure of criminal trials for European British subjects. At present for instance a European accused may demand a European jury as he takes his trial before a sessions court. No Bill will be introduced in the legislature affecting this privilege without the previous sanction of the Governor-General.*

The Federal Legislature is prohibited from passing any taxation Bill that may discriminate against British subjects domiciled in the United Kingdom or Burma or against any company incorporated in any of these two countries. In case such a law is passed, it will be invalid to the extent that it indulges in discrimination. Similarly it will not be open to the Federal Legislature to pass any law which may discriminate in favour of Indian ships and against ships registered in the United Kingdom. If any discrimination is made by a law of the United Kingdom against Indian ships, to that extent discrimination may be made against British ships by an Indian law. Otherwise such a law will be regarded as invalid. The Coastal Shipping Bill which Mr. S. N. Haji sponsored in the Legislative Assembly several years back and which created such

* Sec. 108.

a furore in Anglo-Indian circles will be debarred from introduction in the Federal Legislature. Again the Federal Legislature will go beyond its authority if it passes a Bill which may, by way of encouraging trade and industry, authorise payment of a grant, subsidy or bounty to companies incorporated in India under Indian law alone and exclude from the privilege the companies which are incorporated in the United Kingdom under a law of that country. The benefit must accrue to one set of companies as much as to the other, otherwise the law will be invalid.*

In Chapter IV of Part II of the Act are included the details as to the legislative powers of the Governor-General. Under the Montagu-Chelmsford Reforms, the Governor-General is an important if not a predominant factor of the legislative machinery of the country. He wields far greater power in this field than either house of the legislature. Under the new Constitution also, he will retain these powers in an undiminished condition. We have already seen that the previous assent of this functionary shall be required in case of the introduction of Bills of certain category in either house of the legislature. Secondly, he will have the right to veto all Bills which have been passed by the two chambers of the legislature. These will include even the Bills whose introduction he may have himself sanctioned. Thirdly, he will have the privilege of making certain permanent and certain temporary laws on his own responsibility alone. In

* See Chapter III of Part V of the Act.

order to meet a particular emergency, he will have the right to promulgate an ordinance at a time that the legislature is not in session. This ordinance will have the effect of a law and will remain in operation until the legislature is called to meet. The latter may disapprove of it by a resolution and in that case the ordinance will fall through. If however the legislature does not pass any such disapproving resolution, it will remain in force for six weeks more during which period some permanent legislative arrangement is likely to be made for meeting the particular situation of the country which necessitated the promulgation of the ordinance.

In certain other emergencies again, the Governor-General may issue an ordinance which will remain in force for six months irrespective of the wishes of the legislature. On the expiry of this period he may extend the life of this measure for another six months. Lastly in order to carry out the functions which the Governor-General is to exercise in his discretion under the Act, he may require the passing of some permanent law. For passing such an Act, he is not to depend upon the goodwill of the two houses of the Federal Legislature. He may, of his own initiative and volition, pass forthwith an Act of this description. The one thing he is to do is to send out a message to that effect to both chambers of the legislature. He may also along with the message submit to the chambers the draft of a Bill. The two houses may then present an address to him suggesting therein their views about the contemplated measure and some modifications and amendments which they may

consider necessary. The Governor-General will duly take these views and suggested amendments into consideration and on the expiry of a month enact the law incorporating in, or excluding from, it the modifications proposed by the two chambers. The Act thus passed will have the same force and effect as any Act passed by two houses of the legislature and assented to by the Governor-General.

The restrictions on the legislative powers of the two chambers are thus wide and far-reaching. In the first place the Federal Legislature may pass laws only upon subjects which have been assigned to the federal sphere by the Constitution Act. Secondly, even in this enumerated field the Legislature is not empowered to pass laws of certain description and is authorised to entertain Bills of certain other descriptions only with the previous assent of the Governor-General. Lastly, the independent legislative and ordinance-making powers of the Governor-General indicate the further curtailment of jurisdiction of the two chambers.

CHAPTER XVI

FEDERAL EXECUTIVE

The federal executive will be of a dyarchical character. It will consist of two portions, one being responsible to the federal legislature and remaining in office only so long as it retains the confidence of this body. The other portion however will be practically immune from all its control. It will be responsible to Whitehall alone for the policy it will follow and the lines of action it will pursue. The latter portion may be said to consist of the " reserved " and the former of the " transferred " departments. The subjects specifically reserved are defence, ecclesiastical affairs, external affairs and the control over the tribal areas. These subjects are assigned to the Governor-General. His Ministers will have nothing to do with their administration. They will constitute a sphere of responsibility of the Governor-General himself.*

The Governor-General will continue to be appointed as at present by His Majesty under the Royal Sign Manual. In other words, his appointment will be made as hitherto by the British Cabinet on the recommendation of the Secretary of State for India and the Prime Minister of Great Britain.

* Sec. 11(1) of the Act.

A change, though only of a theoretical character, has been made by the Act in his position and functions. At present the Governor-General is the head of the Government of India, which is entrusted with the paramountcy duties over the Indian States. The department in which these duties are immediately vested is known as the Political Department and the Governor-General himself is the Member in charge of this portfolio. So the duties of control and supervision over the Princes with which the paramount power is invested are no doubt exercised on the immediate responsibility of the Governor-General. But all questions of principle and policy in this field have to be submitted to his Executive Council for discussion and decision.

Since the inauguration of the Montagu-Chelmsford reforms and the establishment of the Chamber of Princes a demand for a change in this procedure, a demand at first feeble but gaining in strength and momentum as time went on, has been put forward by their Highnesses. It has been of a twofold character. In the first place, they have pointed out that many of the powers which the paramount authority has so long exercised over them are unwarranted by treaties and sunuds which were expected to determine the relations between their Governments and the suzerain power. Illegal exercise of authority might have been tolerated in the past but in the new liberal regime it should no longer be persisted in. Secondly, the Government of India might have so long exercised the paramountcy rights but the time has come when the relations of the Princes should be directly with the

Crown. The Government of India must have nothing to do with the administration of the states.

In 1927 at the instance of the Princes a Committee was appointed with Sir Harcourt Butler as the Chairman and General Sidney Peel and Professor W. S. Holdsworth as members to make recommendations on these questions. The Butler Committee submitted its report early in 1929 and gave satisfaction to the Princes on one point but failed to see eye to eye with them on another. It was of opinion that the relations of the Princes should be directly with the Crown and its Representative and not with the Government of India in the new regime.* But as regards the powers actually exercised by the paramount power over the affairs of the states, the Committee found it difficult to recommend the grant of any relief to the States.†

These views of the Committee were accepted by His Majesty's Government and accordingly when the new Government of India Act was framed the Federal Government of India was deprived of all paramountcy jurisdiction over the States, and this jurisdiction was handed over to a functionary to be known as His Majesty's Representative. Under Sec. 3 of the Constitution Act, the Representative and the Governor-General may be two different persons with completely differentiated functions, the latter being the head of the Federal Government

* Report, pp. 58, 67.
† *Ibid*, para. 57.

and the former being entrusted only with the paramountcy duties over the Governments of the States. Of course under sub-section (3) of the same Section of the Act the power is retained to appoint the same person to both the offices. The gentleman who will be appointed the Governor-General may also be given the functions of His Majesty's Representative with regard to the Indian States.

It is unlikely in fact that the two functionaries will ever be separately chosen. The Governor-General has been assigned a crucial position in the federal system. The efficiency of the administration of federal subjects in the states will depend absolutely upon the way that he will discharge his duties of supervision. Now in case the Governor-General is at the same time His Majesty's Representative with regard to the paramountcy functions, his prestige will be unbounded in the States as at present and he will find it possible to enforce his obligations. But if a separate person is appointed as Representative and the Princes are required to deal with him in respect of their obligations to the paramount power, the Governor-General will be denuded of that authority and prestige in the States without which he will find it difficult to make the federal administration a success in these territories. Secondly, there is also the risk of the Governor-General and the Representative coming into friction and rivalry. It is, therefore, unlikely that two separate functionaries will ever be appointed. There is a provision in the Act for the two, mainly for emphasising the distinct and separate character of the two sets of functions.

The Governor-General is unlikely to be ever recruited from among Indian Statesmen. In the self-governing Dominions where the Governor-General has been reduced to the position of a mere ceremonial and ornamental figure-head,* the practice of importing this functionary from Great Britain remains deep-rooted. Only in the Irish Free State a different tradition was allowed to be fostered.† In Australia for one term an Australian was appointed, no doubt, to the office of the Governor-General, but on the expiry of his term, the old practice was reverted to. In Canada there has been no departure from this tradition. It should be noted that not only the Governors-General in these Dominions are a " political cipher " but their appointment is subject to the approval of the Dominion Government concerned. If even under these circumstances, an appointment from Great Britain has been so uniformly favoured, it is unlikely that a local man will be appointed to the Governor-Generalship of India. Such a contingency is more unlikely still in view of the fact that the Governor-General will be at the same time the Representative of His Majesty in respect of the paramountcy functions.

It is not expected also that the Governor-General will be recruited from among the members of the Indian Civil Service. Since the post was

* Long ago Goldwin Smith declared him to be serving as a ventriloquial apparatus to the Ministers. See *Canada and the Canadian Question* (1891), p. 148.

† Now of course the office of the Governor-General has been abolished in the Free State

created under the Regulating Act of 1773, three substantive appointments have been so far made to it from the permanent administrative service—Warren Hastings, Sir John Shore, and Sir John (Lord) Lawrence.* Besides these permanent appointments several vacancies were also filled by promotion from the Civil Service. But the experiment of Civil Service Governors-General was not regarded as a success. Even as early as 1835, Sir Charles Metcalfe who was officiating as the Governor-General of India was not made permanent in this appointment, inspite of his sterling merits as an administrative officer, only on the ground of his connection with the Indian Civil Service. The Court of Directors nominated him for permanent appointment but the Board of Control turned down the nomination on the basis of the dictum which had been laid down several years back by George Canning that only persons with experience of British public life should be sent out to India as the head of its administration.† Of course, about a quarter of a century later this dictum was violated and Lord Lawrence was appointed to the office of the Governor-General and Viceroy in succession to Lord Elgin who died in this country. But this elevation of Lord Lawrence was only a recognition of the great services he had rendered during the

* A permanent appointment was also offered more than once to Mountstuart Elphinstone who had been a member of the Covenanted Civil Service and had retired as the Governor of Bombay. But he was constrained to refuse the offer. See J. S. Cotton, *Mountstuart Elphinstone* (Rulers of India Series, 1896), p. 15.

† Kaye, *Life of Metcalfe*, Vol. II (1854), pp. 233-237.

Mutiny. Nor was the administration of Lord Lawrence as Viceroy and Governor-General of such a character as to encourage the British Cabinet to resort again to an appointment from the Civil Service.*

A member of the Indian Civil Service may acquire considerable mastery over administrative details but as he remains enmeshed for one quarter of a century and more in these details, he is apt to lose grasp over broad principles and become narrow in outlook and timid in imagination. He becomes familiar with certain procedure and certain arrangements and however faulty and out of date they may be he feels disinclined to improve and rectify them. Besides the head of the Government of India must have experience in these days of studying and scanning public opinion and responding to it on critical occasions. He cannot afford to neglect it altogether and ride roughshod over it. A member of the Indian Civil Service however hardly acquires the knack of studying and evaluating public opinion. He lives in a world of his own and becomes usually indifferent to what moves men outside his official sanctum.

It is expected therefore that the practice of recruiting Governors-General from British public life will be continued. By public life of course definitely parliamentary life has not always been meant. There have been some heads of the Govern-

* Lord Lawrence's own biographer admits the shortcomings of a Civil Service Governor-General. See B. Smith, *Life of Lawrence*, Vol. II, pp. 396-97.

ment of India who belonged to British public life but had little experience of British Parliamentary activities to their credit at the time of their appointment. A few were recruited from the diplomatic field and a few from the military fold. Of course neither in the military nor in the diplomatic spheres there is any dearth of talent. Nor did Governors-General like Lord Hardinge prove in any way unworthy of the office they were called upon to occupy. But talent brought out in these spheres may not be usually suited to present Indian conditions. Governors-General should be chosen almost exclusively from among those British publicists who are bred in parliamentary traditions and have experience of and sympathy for parliamentary institutions.

The Governor-General from whatever walk of life he may be chosen will alone be responsible under the Constitution Act for the reserved departments. As he may find this task too heavy, he has been permitted by the statute to appoint Counsellors for the administration of these departments. Their number is not to exceed three.* Their salaries and conditions of service are not to be laid down by the Indian Legislature but by the British Cabinet. They will owe their position to the Governor-General and will owe no responsibility to the Federal Legislature.

Under Section 4 of the Constitution Act, His Majesty's forces in India will have at their head a Commander-in-Chief appointed by Warrant under the Royal Sign Manual. It is yet to be seen whether for the conduct of the department of

* Sec. 11 (2).

defence the Governor-General will be assisted and advised by the Commander-in-Chief, or whether he will have a special Counsellor. Till the close of the Viceroyalty of Lord Curzon, the Commander-in-Chief was no doubt an extraordinary member of the Governor-General's Executive Council. But there was also on this body a regular Military Member. Lord Kitchener, at the time the Commander-in-Chief of India, set his face against the arrangement under which the department of defence spoke with two voices on important military questions in the Executive Council. He advocated the abolition of the Military Member. He wanted to make the Commander-in-Chief the only military adviser to the Government of India. Lord Curzon however took the opposite standpoint. He was of opinion that the military must be subordinate to the civil power. But if the civil power was at all to come to an independent conclusion on military problems, it was but necessary that the Executive Council should have the advantage of the opinions of both the Commander-in-Chief and another Military Officer of high rank and independent position.

The British Cabinet sided in this controversy practically with Kitchener and though for a time some compromise was chalked out, after a short experiment this compromise was found unworkable and consequently abrogated. Since 1909 the sole military adviser of the Government of India has been the Commander-in-Chief. Now in case a separate Counsellor other than the Commander-in-Chief is appointed by the Governor-General for the

department of defence, Lord Curzon will at last be vindicated. Every unbiassed person who has had occasion to comment on the controversy between Curzon and Kitchener has unhesitatingly left it on record that Curzon and his supporters were right in this issue and Kitchener and the British Cabinet were in the wrong. It will therefore be reasonable and proper for the Governor-General to have at his elbow a Counsellor of high military rank who will be in a position to rebut the arguments of the Commander-in-Chief with authority and effect on occasions.

What exactly the conditions of service of the Counsellors will be, it is difficult to surmise now. But there is no denying the fact that they will not have the status of the present Members of Council. It may be asked whether the Counsellors will meet as a Council with the Governor-General in the chair to discuss and decide upon questions of the reserved departments. The reply should be in the negative. These departments have been placed in charge of the Governor-General alone and the executive in this sphere is not collegiate but individual. The Governors-General have all along enjoyed great authority and exercised great power. But since the time that Cornwallis was given the right to override the decisions of his Council it has been only in emergencies that they have had their own way. Normally the policy of the Government has been shaped on the collegiate basis. The responsibility has attached not merely to the head of the Government but to the Council. It is only on particular occasions that in coming to some important decisions

the Governor-General may have looked at the question from one angle and the majority of the Council from another. In respect of important subjects and grave issues alone, he may have thought it right and necessary in the interests of good government to override the decisions of the majority and resort to a policy of his own.

This collegiate executive has won the favour of the Indian public. One-man rule has been inconsistent with their ideals and aspirations. Years ago when the Lieutenant-Governors of Provinces ruled the territories under their charge only with the help of Secretaries who were their subordinates and could not argue with them on equal grounds, the Indian public demanded that this system should be modified and that the Lieutenant-Governors should have Executive Councils associated with them. Gradually this demand was conceded. Bengal secured an Executive Council in 1909, Bihar and Orissa in 1912 and the other provinces after the inauguration of the reforms in 1921. But the Act of 1935 contains provisions which will in several ways undermine the collegiate form of executive. We shall have occasion later on to refer to the special powers vested in the Governor-General and the Governors. This much it is sufficient here to say that they will sap the foundations of the collegiate executive and make for the concentration of power in the hands of a single functionary.

But the Governor-General will otherwise also have great powers concentrated in his hands. As the Representative of His Majesty with regard to the Indian States, he alone will be henceforward

responsible for the administration of the Political Department. Similarly the departments of defence, external affairs and ecclesiastical affairs will be withdrawn from the control of a Council and placed under the sole executive charge of the Governor-General. This concentration of authority in the hands of one officer, however highly placed, will be not only an unwelcome departure from the executive traditions created since 1772 but may not work properly in practice. If it is not contemplated that the three reserved departments will be transferred in the near future to the Council of Ministers, it will be better if the responsibility for their administration is vested, instead of in the Governor-General alone, in a small Council consisting of the Governor-General and his Counsellors.

Excepting the functions which are assigned to the sole charge of the Governor-General and which have been described as reserved, all other powers and functions of the Federal Government will be handed over to a Council of Ministers. The number of Ministers constituting this Council will not exceed ten. They must be members of either house of the Federal Legislature and in case they are not so at the time of their appointment as Ministers they must become members before the expiry of a period of six months. If this condition is not fulfilled, they will cease to occupy the office of Minister. The Ministers will of course be appointed by the Governor-General and he will not be debarred from appointing one or two of them from among those members who are nominated by him to the upper house. Under the Government of India Act, 1919,

the Ministers in the provinces had to be elected members of the Councils. Nominated members were not eligible for these offices.

But although the Governor-General will have the liberty to appoint a nominated member of the Council of State to be a Minister, he must see to it also that the Ministers chosen by him really enjoy the support of the legislature. For long it has been the demand of the Indian public that the Executive Government of India should be responsible to, and removeable by, the Indian Legislature. It should hold its office not during the pleasure of the British Cabinet but only so long as it enjoys the confidence of the Indian Legislature. This principle of responsible government is now being introduced in the Federal Government of India. The reserved departments will not of course be run in responsibility to the Federal Legislature. For their administration, as pointed out already, the Governor-General will be accountable to Whitehall. But the other departments which will be placed in charge of the Ministers will be administered only in responsibility to the Legislature.

In the Statute of course there is no mention of this subject. It is, on the contrary, laid down that the Ministers who will conduct the transferred departments will hold their office during the pleasure of the Governor-General. The latter may dismiss them any time he chooses. But neither in Great Britain nor in the Dominions* the responsibility

* The system in the Irish Free State is different. See Art. 51 of the Free State Constitution.

of the Ministers to the Legislature is of statutory origin. It is not sanctioned by the written constitution. It is based only on convention. The King in Great Britain has still the constitutional right of dismissing his Ministers. But the last time he exercised this right was in 1834 when the Melbourne Ministry was dismissed by William IV inspite of its retaining the confidence of the House of Commons. It is now decreed by practice that a Ministry remains in power so long as it enjoys the support of the Legislature, irrespective of the wishes of the Monarch.

The responsibility which the Ministers owe to the Legislature in Great Britain and the Dominions is both individual and collective. The Ministers are both severally and jointly responsible to the legislature for their actions. The development of this joint responsibility of the Ministers has been possible only because of the solidarity of the political parties of these countries. Public life is divided usually into two groups. The group which acquires a majority in the popular house of the legislature is called upon to form the Ministry. The Ministers thus happen, as a rule, to belong to the same party, to be inspired by the same ideals, to follow the same policy and work under the same leadership. Consequently the Cabinet becomes homogeneous. The Ministers who have long served the same political party and shared in its defeats and gloried in its triumphs find it easy to present a common front to the legislature below and the sovereign above. Under the captaincy of their leader they work as a team. As soon as the elections are over, the accre-

dited leader of the party which secures the majority in the legislature is called upon to form the Ministry. He accordingly kisses the hands of the sovereign and assumes the responsibility of the Prime Minister. The other Ministers are all appointed on his nomination. Only theoretically and formally they are appointed to their office by the Crown. Actually they are appointed to their respective posts by the Prime Minister. Very seldom has the sovereign during the last few decades recommended a name to the Prime Minister or set his face against a nomination made by him. This nomination of the Ministers by the Premier makes for the unity and solidarity of the Ministry.

In India also it is provided for in the Instrument of Instructions to the Governor-General that he must in the first instance appoint a Chief Minister. The person who may be regarded by him as occupying a pre-eminent position in the legislature and who may command the support and confidence of the majority of his fellow members should be chosen in this capacity. The other Ministers are to be chosen by the Governor-General in consultation with and on the advice of this functionary. This may indicate that in the Federal Government of India also the Ministry will work under one leader and will be in consequence as united as a British Ministry. But there are several factors which will work against such a contingency.

In the first place in the Federal Assembly to which the Ministers are expected to be responsible, there is little chance of any one party securing a clear majority. This body will consist of a number

of groups based more on racial, communal and sectional interests and less on political principles and ideals. None of these groups will have a majority in the Assembly. The members returned by the States are likely to form one group, the Mahomedans will form another, the depressed class members will constitute a third, the Europeans a fourth and the British Indian caste Hindus a fifth. So Ministries will have to be formed only on the basis of a coalition of two or more such groups. But a coalition Ministry is hardly ever a compact and closely united body. It usually becomes a combination of disjoined atoms. If again a coalition of several political groups with principles, though not exactly the same yet not completely dissimilar, produces a weak and disjointed ministry, it may be imagined how disunited and ramshackle will be the character of a Ministry which will be formed as a result of a coalition between several racial and sectional groups.

In France Governments are always of a coalition character. No group by itself is ever in a position to form a Cabinet. Several groups have to combine to constitute a Ministry. As a result, Governments become weak and transitory no doubt. But it should be borne in mind that such coalitions are not all the same as artificial and unnatural as they are sometimes considered to be. The French are a logical people and are apt to magnify differences which the English usually happen to ignore. The differences in political principle between one group and another are sometimes really so small that in a country like Great Britain they would never have been emphasised and the two groups would never

have been allowed to be distinct and separate. They would have been part and parcel of one united political party. Shades of difference between one group and another being so light, their co-operation in forming one Ministry is natural and inevitable.

In France the Ministers recruited from different groups may look at questions almost from the same angle and face difficulties almost in the same manner. But in India, Ministers, recruited from different racial and sectional groups, may hardly be expected to have even that unity of outlook and similarity of convictions and views. The shades of difference between one group and another are likely to be deep, not light. The coalition Ministry which will have to be formed cannot under these circumstances be expected to be really a compact team captained by one leader and following a common and united policy. The Council of Ministers in fact will not in all probability possess that cohesion without which joint responsibility and collective work become difficult, if not impossible. The authority of the Chief Minister is likely to be nominal. The representatives of groups to which this functionary does not belong may not accept his leadership as loyally and faithfully as they may be expected to do.

The Federal Assembly in fact will be so organised into different widely separated groups that though a coalition is effected between two or three of them, it will be the handiwork not of any party leader but of the Governor-General himself. His influence and prestige are likely to be the predominant factor in making the coalition. The leader of this group or that may then be appointed the Chief

Minister. But he will occupy this position more or less in name alone. The real chief will be the Governor-General himself. In the choice of other Ministers the Chief Minister will be consulted no doubt and will be encouraged also to bring forward names. But the voice of the Governor-General in such choice will be inevitably predominant. So the Council of Ministers may outwardly work as a body but actually the different Ministers are likely to run their departments in their own way under the supervision of the Governor-General. If a particular Minister becomes unpopular in the Assembly, loses support of the majority of its members and is constrained on that account to resign his office, it is unlikely that his colleagues will follow him into the wilderness. The work of the Ministers will thus in all probability be individual, not collective, and their responsibility to the Legislature also will be in consequence several, not joint.

The situation foreshadowed in the previous paragraphs will be further aggravated by an obligation which has been imposed upon the Governor-General by the Instrument of Instructions. He will be required to see that the Ministry does not consist of the representatives of the major communities alone. It will be his duty to see that the minorities are also adequately represented in this body. A particular minority group may not in any way see eye to eye with the Chief Minister appointed by the Governor-General but all the same a member of this group may have to be appointed to the Ministry. If the Chief Minister refuses to nominate any one of this

group, the Governor-General may have to step forward and make the nomination on his own direct responsibility. A jarring element will thus have an accession to the Council of Ministers, whose solidarity and homogeneity will be considerably undermined on this score.

While the factors enumerated above will make it difficult for the principle of joint responsibility to the legislature to grow in the Indian Federation, there are several reasons again why even the individual responsibility of the Ministers will be considerably undermined. The rules according to which the business of the departments will be conducted will be framed by the Governor-General.* It is explicitly laid down in the Constitution Act that one of the rules so framed will require not only the Minister but also the Secretary to his department to place before the Governor-General all information concerning the business of that department. Such practice obtains to-day in the Secretariat of the Government of India. So long as the executive is not responsible to the legislature and is accountable to Whitehall this system is salutary. But once the Council of Ministers is expected to be responsible to the legislature, it becomes obnoxious.

In the provinces the position of the Ministers under the Montagu-Chelmsford reforms became largely untenable and even ludicrous because of the continuance of this rule of procedure in the administration of their departments. The Secretary had the right to see the Governor over the head of the

* Sec. 17.

Minister on a fixed day of the week. Sometimes the arrangement was such that the Secretary had an interview with the Governor earlier than his Minister. During the interview the Secretary would talk about all business of his department with the Governor and settle with him the lines of action to be taken and the policy to be followed. When next the Minister would see him, he would find to his discomfiture that a decision was practically ready for him to approve.* Not only in cases of important policy but also in petty matters if the Secretary and the Minister did not agree, the opinion of the latter did not prevail automatically. The subject would be carried to the Governor and if he sided with the Secretary as he very often did, the Minister's opinion went to the wall. The caballing of the Secretary with the Governor undermined the prestige and sapped the authority of the Minister in the provinces.†

The same practice will have the same effect in the Federal Government as well. The constitutional right of the Secretary to a department to see the Governor-General behind the back of his Minister and advise the former as to the way questions should be settled and problems should be solved may make the position of the latter unenviable and hollow. The relations between the Minister and the permanent staff of his department should be entirely different, if his position is at all to be effective. The Secretary and his subordinates must be required to

* See the Memorandum of the late Harkishan Lal to the Muddiman Committee, Appendix No. 5 to the Report, p. 349.

† See the Memorandum of N. K. Kelkar, *ibid*, p. 416.

live and move only behind the Minister. Beyond him they must not look for inspiration and guidance. They must place before him the pros and cons of every question that invites the attention of the department and may suggest to him a line of action. In case however the Minister decides to follow another course, they must shelve their objections and proceed to carry it out as best as they can. It is a travesty of the Minister's position that over his head the Secretary of his department will see the Governor-General and insist in the closet on the rejection of the policy of the Minister and the acceptance of his own.

The special responsibilities which have been conferred upon the Governor-General by the Constitution Act* are likely to undermine further the position of the Minister and augment the powers of the Secretaries and other members of the permanent staff. The Governor-General is made responsible for preventing any grave menace to the peace or tranquillity of the country, for safeguarding the financial stability of the Government, for protecting the legitimate interests of the minorities, for securing to the members of the public services their constitutional rights, for preventing any discrimination against the importation into India of goods from the United Kingdom and Burma and for protecting the rights of an Indian State. These are very comprehensive provisions and even the most wary and careful Minister will find it difficult to chalk out a policy for public welfare without encroaching upon this

* Sec. 12.

sacred domain. But once he is on the point of stepping into it he will be confronted by a sharp reprimand from the sentinel posted at the frontier. It is the duty of the Secretary* to inform both the Minister and the Governor-General that the contemplated action involves or appears to involve any special responsibility of His Excellency. And once the Minister is informed of this fact, he must desist from taking his contemplated step. He will thus be considerably handicapped in discharging his responsibility to the Legislature.

The authority of the Ministers will be undermined again not merely by the special privileges of the permanent officers of their departments and by the special powers of the Governor-General. It will be further curtailed otherwise as well. So long the State Railways have been managed and rules and regulations for other Railways have been framed by a Railway Board. This body is a creature of Indian legislation and is subordinate to the Indian executive. It discharges the functions entrusted to it on behalf of and in responsibility to the Governor-General in Council. But the new Government of India Act provides for the establishment of a statutory Federal Railway Authority. According to the rules laid down in the 8th schedule of the Act, this body will consist of seven members for the time being. Of these seven three will be appointed by the Governor-General in his discretion and the remaining four he will appoint in consultation with his Ministers. The President of the Authority will

* Sec. 17(4).

be appointed from among its members by the Governor-General in his discretion.* The Railway Authority thus constituted will be invested with "the executive authority of the Federation in respect of the regulation and the construction, maintenance and operation of railways."†

The Federal Railway Authority will discharge the duties entrusted to it "on business principles."‡ Of course "on questions of policy" it will be guided by the instructions issued by the Federal Ministers. But in case there is a dispute between the Ministers and the Railway Authority "as to whether a question is or is not a question of policy," the matter will be referred to the Governor-General who will decide it finally in his discretion.§ So it comes to this that the authority of the Ministers over this important department will be to all intents and purposes nominal in character. The tragedy of the situation is that they will be responsible to the Legislature for the efficient management of the Railways but actually they will exercise little control over it. It is always very difficult to distinguish between the policy and the details of management. A person who has control over policy but is debarred from all control over details may not exercise any

* Under Section 182 of the Government of India Act, the Governor-General will always be required, whatever may be at the time the total membership of the Railway Authority, to appoint in his discretion three-sevenths of the members. He is also required always to appoint in his discretion the President of the Authority from among its members.

† Sec. 181.

‡ Sec. 183(1).

§ Sec. 183(2).

power over the policy even. It is not necessary for a Minister to interfere in details of management. But if the Railway Authority knew that he had the right to call for explanation as regards such details, it would have been more punctilious in giving effect to his instructions as regards policy. Any way the Ministers will exercise only little control over the department of the Railways and the little power they will enjoy over it will also be dependent upon the goodwill of the Governor-General.*

In view of the facts enumerated in the above paragraphs it will be idle to say that the Council of Ministers in the Indian Federation will be a counterpart of a modern Cabinet in Great Britain, the Dominions or even France. It is likely, on the contrary, to be a counterpart of an English Ministry of the days of William III or Queen Anne.

* In matters of finance also the control exercised over them by the Governor-General may make the Minister's responsibility only illusory. It will be a part of the special responsibility of the Governor-General to maintain financial stability of the Federal Government. To this end he will be required to appoint a Financial Adviser.

CHAPTER XVII

PROVINCIAL AUTONOMY

Provincial autonomy is regarded as the corner stone of the new constitution of India. This autonomy was first envisaged in the Despatch which Lord Hardinge's Government submitted to Whitehall in 1911. Its beginning was made under the reforms introduced in 1919 and it is supposed to have attained its culmination in the Constitution Act of 1935. It is needless to point out here that by provincial autonomy is not meant full-fledged independence of the provinces in every sphere of administration. It does not make them by any stretch of imagination fully independent states. The Indian Government has been organised on a federal basis. The functions of administration common to the whole country have been handed over to the Federal Government. Functions which are the concern of the provinces alone have been vested in the provincial authorities. Freedom of these authorities to perform these latter functions in their own way unhampered by dictation and interference from above goes by the name of provincial autonomy.

It is for us now to examine the nature of the freedom which has been conferred upon the provinces by the Act of 1935 in this restricted sense. The autonomy would have been true and real if all

the functions vested in the provincial authorities could be carried out by them only in full responsibility to the representatives of the people of the provinces. It was in this sense that provincial autonomy was demanded by the late Mr. C. R. Das in the famous Faridpur speech some time before his death. If the Governor of a province was really its constitutional head as he happens to be in a state of the Australian Commonwealth or in a province of the Canadian Dominion, and if all the powers belonging to the Provincial Government were exercised by the local Ministry in responsibility to the local legislature, the autonomy of the provinces might have been regarded as real and substantial. But not only innumerable restrictions have been placed upon the authority of the Council of Ministers and upon the jurisdiction of the Legislature to which it is expected to be responsible but to the extent that the authority of the Ministry and the Legislature has been limited that of the Governor has been enlarged and augmented.

Like the Governor-General the Provincial Governors also have been invested with a number of special responsibilities. They are specially responsible for preventing any grave menace to peace or tranquillity of the province, for safeguarding the legitimate interests of the minorities, for protecting the rights and privileges of the public services and for securing the peace and good government of excluded areas.* The Governor is entitled to prevent any executive order from being

* Sec. 52(1).

issued by the Ministers touching upon these matters. He is also entitled to issue or cause to be issued any order which may secure the object in view in these fields. The powers of the Governor again are not merely executive in these spheres. He has independent powers of legislation as well. If he finds that an emergency has arrived with regard to any of these matters he may meet it by an ordinance which will remain valid and effective for six months on the expiry of which period he may extend it for another six months.* If he thinks again that some permanent remedy is necessary, he may pass a law on his own account. If he pleases he may send the Bill to the legislature which may, in an address, place before him within one month some amendments to this Bill. The Governor is then at liberty to make it an Act with or without these amendments.† Just as again the Governor may pass a law on his own account for the discharge of his special responsibility, so if a demand for grant is rejected or assented to only in a modified form by the legislature and if this action of the legislature affects adversely the due discharge of any special responsibility of the Governor, he may restore the grant on his own authority.‡ These powers of the Governor constitute effective restrictions on the authority of the Ministers and the Legislature. But these powers he exercises only in full responsibility to the Governor-General and

* Sec. 89.
† Sec. 90.
‡ Sec. 80(1).

Whitehall.* Not only he does not look to the Provincial Legislature for the approbation of his acts in this sphere, but his legislative and ordinance-making powers are especially exercised only with the concurrence of the Governor-General.† As soon as a Governor's Act is passed it has to be sent to the Secretary of State through the Governor-General so that it may be placed upon the table of either House of Parliament.‡ So through the agency of the Governor, extra-provincial authorities have ample scope of controlling even that sphere of administration over which the provinces were expected to enjoy autonomy.

In the domain of law and order the autonomy of the provinces happens to be the most unreal. When the Simon Commission began its itinerary in this country some of the witnesses who appeared before this body were definite in their opposition to the transfer of the department of law and order to the Ministers responsible to the Legislature. This transfer would, in their opinion, become a menace to the safety and tranquillity of the province. The machinery of law would break down and the provinces would be overtaken by an outbreak of anarchy. The Indian Central Committee which was associated with the Simon Commission, and which submitted its report earlier recommended however the transference of this department to the Ministers in all provinces except one. The invi-

* Sec. 54.
† Sec. 89(5).
‡ Sec. 90(4), (5).

dious distinction was made against Bengal. It was argued that as there existed in Bengal an acute communal tension it would not be safe to hand over the department of law and order in this province to a Minister responsible to the Legislature.* The province in other words must forego the privilege of full autonomy as a punishment for Hindu-Moslem rivalries. But while this was the recommendation of the Indian Central Committee, the Simon Commission refused to be a party to any such invidious statutory discrimination.†

When the Round Table Conference met in London, it was emphasised by Lord Zetland that although a Minister responsible to the Legislature might be placed in charge of the department his control over it must not be absolutely unfettered. It was now suggested that the existing Police Acts which vested in the Inspector-Generals of Police real control over the internal economy of the police forces must not be changed by the local Legislatures without the previous assent of the Governor-General,‡ and that responsible police officers must not be required to divulge to the Minister in charge the sources of their information as to the movements of conspirators and dangerous characters. It was thought that if the Police Acts were changed at the instance of the Minister in charge and with-

* Report, pp. 30-31.

† Report, Vol. II, p. 33.

‡ Discussion on the subject was originally introduced in the Provincial Constitution Committee of the R. T. C. and from there it was shifted to the Services Sub-Committee. See Report of Services Sub-Committee, pp. 178, 237 and 253.

out the previous assent of the Governor-General, the organisation of the police might become unhinged and the discipline and morale of the police force might positively be undermined. Again if the Ministers were curious about the sources of information as to the movements of dangerous persons and insisted on their being divulged to them, the life of the informers and spies might become insecure. It was pointed out that in England also the head of the Scotland Yard never divulged to the Home Secretary the sources of his information. Consequently it would not be derogatory at all to the position of the Indian Ministers in charge of the department of law and order if these sources of information were withheld from them. But it should be known that although the police in London may not usually apprise the Home Secretary of the sources of their information, there is no law barring the Home Secretary from such information. If he insists on being informed, the Scotland Yard will have no alternative but to comply with his request.

Anyway the opinions this expressed in the Round Table Conference were embodied in the Government of India Act, 1935. A particular person may be prosecuted or detained on the strength of information supplied by certain persons. But the Minister who is the political head of the department is not entitled to have any idea of the character of the persons whose evidence is accepted as the basis of the prosecution or detention. If the Minister insists on being enlightened in this matter, the head of the police may refuse to act up to his wishes and he may be supported in this

matter by the Governor.* Similarly over the internal organisation of the police the Minister has little opportunity of exercising any control. Rules and regulations in this sphere have to be framed by the Governor acting according to his individual judgment.† So the Inspector-General and the Commissioner of Police are directly responsible to the Governor so far as organisation or discipline of the force is concerned.

Although therefore the department of law and order has been transferred in theory to the care of a Minister, it is virtually a preserve of the Governor. Not only is the Inspector-General directly responsible to him with regard to the internal organisation and discipline of the police force of the province, but otherwise also the responsibility of the Governor with regard to this department is direct. It is a part of his special responsibility to see that there is no menace to safety and tranquillity in any district of the province. In case law and order are actually menaced in any part of his province, he may take any measures he chooses on his own responsibility. He may even stop the discussion of a Bill which has already been introduced in the legislature or is proposed to be introduced there, if he thinks that any such discussion will affect the discharge of his special responsibility in this sphere.

The powers allotted to the Governor do not constitute the only check upon the authority of the Ministers and the jurisdiction of the Legislature. The position assigned to the Indian Civil Service

* Sec. 58.
† Sec. 56.

and the Indian Police is also an effective impediment to the enjoyment of real autonomy by the provinces. Secretaries to the different departments of the Government and the officers in charge of the districts and divisions are recruited from the former body while the superior agents for maintaining peace and preventing disorder are supplied by the latter. They are not however completely amenable to the discipline and control of the Ministers. They continue to be appointed on the responsibility of the Secretary of State for India and are open to dismissal only by the same authority. Nor do they depend wholly upon the Ministers either for their promotion in office or for their transference from one place to another. Their extra-Indian recruitment and the peculiar conditions of their service hardly fit in with the principle of provincial autonomy.

It may be repeated in fact that although in theory the provinces enjoy, under the Government of India Act, 1935, autonomy over a large sphere of public administration, it is considerably undermined in practice by the exercise of special responsibility on the part of the Governor and by the enjoyment of special privileges and rights on the part of the Indian Civil Service and the Indian Police. Whether in the interests of the different groups of people in a province the Governor should exercise these special powers and the Indian Civil Service and the Indian Police should enjoy these special privileges is another matter. But the fact is that they are not consistent with the principle of provincial autonomy.

CHAPTER XVIII

PROVINCIAL EXECUTIVE

The executive authority of a province has been vested by the Constitution Act * in a Governor. Ordinarily he is aided and advised by a Council of Ministers in the discharge of his functions.† But as it has been pointed out in the previous chapter, he has certain special responsibilities also and these special functions he is required to exercise in his own discretion.

" The Governor is appointed by His Majesty by a Commission under the Royal Sign Manual." ‡ It was pressed before the Joint Committee that all the Governors should in the new regime be recruited from the United Kingdom and that there should be a statutory prohibition against the appointment of members of the Indian Civil Service as Provincial Governors. The Joint Committee however refused to accept this suggestion. The Committee not only held the view that His Majesty's selection of Governors ought not to be fettered in any way but was also of opinion that as in the past so also in the future men in every way fitted for appointment as Provincial Governors would be found among the members of the Indian Civil Service.§ So

* Sec. 49(1).

† Sec. 50(1).

‡ Sec. 49(1).

§ Report, Vol. I, Pt. I, p. 57. The objections to Civil Service Governors are however as real as the objections to Civil Service

while some of the Governors continue to be recruited in the United Kingdom as before, the rest are chosen by promotion from among those members of the Indian Civil Service who have distinguished themselves in public administration in this country. In the choice of Governors from among these officers the Governor-General exercises a definite voice as he used to do in the past.

Before the operation of the new Act, the Governor used to discharge the duties of his office with the help of a Private Secretary. Only in rare instances he required the services of an Assistant Private Secretary. But under the new regime his responsibilities have become more onerous and consequently a more elaborate secretariat has been established in the Government House headed by a Secretary who is recruited from among comparatively senior and experienced members of the Indian Civil Service. This innovation has been brought about on the recommendation of the Joint Committee.*

Except in the discharge of his special responsibilities the Governor is aided and advised by a Council of Ministers. Neither the maximum nor the minimum has been fixed by statute as to the number of Ministers to be appointed. The number varies from province to province.† The Ministers are appointed by the Governor from among

Governor-General. The former should be recruited on the same basis as the latter.

* Report, Vol. I, Pt. I, p. 57.

† The number varies from eleven in Bengal to two in the Frontier Province.

the members of the Provincial Legislature. In case a Minister is not a member of either house of the legislature at the time of his appointment, he must become one within six months otherwise he will be required to resign the Ministership. Under the Montagu-Chelmsford constitution, Ministers could be selected only from among the elected members of the Legislature. But under the new Act a nominated member of the Upper House is not debarred from appointment as Minister.

The Ministers are no doubt appointed by the Governor and hold office during his pleasure. But he is required to choose only those persons as Ministers who command the confidence of the legislature. In other words as in the Federal Government so in the Provincial Governments also the Ministers are to hold their office during the pleasure of the Legislature. They remain in office so long as they enjoy the confidence and command the support of the Legislative Assembly and are required to go out of power if they fail to retain this confidence and cease to command this support. The Ministers in other words are responsible to and removable by the Legislative Assembly. Under the Montagu-Chelmsford constitution, only the " transferred departments " were conducted in responsibility to the Legislative Council. In the new regime however all the departments are administered according to this principle.

It was proposed before the Joint-Committee that there should be a provision in the Act to the effect that the Ministers should be collectively responsible to the Legislature. But the Committee

discussion in the budget session on the salaries of the Ministers and they cannot be reduced or refused by way of expressing want of confidence either in individual Ministers or in the Ministry as a whole. The Joint Committee has also suggested that even in case a demand for a grant is reduced or refused by the Assembly, the Ministry may not regard it as the withdrawal of confidence and may refuse to resign. "There is every reason," the Committee observed, "why Ministries in India should refuse to treat a hostile vote, even on a demand for supply, as necessarily entailing resignation." If a hostile vote on a demand for supply may be so treated, it need not be pointed out as to how a hostile vote on any other measure may be interpreted by the Ministry. The Joint Committee in fact thought it desirable that "a Ministry should only resign on a direct vote of no confidence."* The provision in the Act with regard to the Ministers' salaries and the recommendation made by the Joint Committee with regard to the occasions of resignation were intended only to ensure the stability of the Ministries in the provinces. In every Assembly a solid and compact majority may not stand behind a Ministry. The house in fact may be divided into a number of groups and the Ministries may be invariably coalition in character. But once a Ministry is formed, attempts may be made by some of the groups to break up the coalition and destroy the Ministry. The object of the Joint-Committee was to thwart such attempts on as many occasions as possible.

* Report, Vol. I, Part I, p. 63.

If the province is to be well governed, the executive must be both stable and vigorous. In Great Britain the majority behind the Ministers in the House of Commons is usually compact in character and staunch in loyalty. Consequently no ministerial measure is, as a rule, rejected in the House. When it is so rejected, the Ministry has reasons to believe that its general policy is no longer acceptable to the House and consequently either it resigns or dissolves the Parliament. In an Indian province the majority behind the Ministry in the Assembly may be fickle and consequently if the Ministry resigns whenever it fails to receive the majority of votes in favour of its measures, such resignations will be in all likelihood very frequent. The executive will be unstable and the administration weak and inefficient. The recommendations of the Joint Committee are therefore in the right direction.

It has been pointed out that although the Executive in the provinces is in all the departments responsible to the Legislature, ministerial responsibility is worked under certain limitations. One of the main limitations consists of course in the special powers vested in the Governor. The Governor exercises these powers only in responsibility to the Governor-General and the Secretary of State. The provincial Legislature has no control over this sphere of executive authority. The special powers of the Governor therefore set at once a bound to the responsibility of the executive to the legislature. The second limitation is supplied by the relation in which the permanent Secretaries happen to stand to the Ministers of their respective departments on

the one side and the Governor on the other. The rules of business are framed by the Governor and it is enjoined upon him by the Statute * that rules should be so framed that the Secretaries to the different departments may be obliged to bring to his notice everything that is being done in their departments. The Secretaries have now in fact direct access to the Governor and may not only bring to his attention everything with which their departments are directly or indirectly concerned but may also bring to his notice those activities of the Ministers which he should discourage and disapprove as inconsistent with the special responsibilities vested in him. During the Montagu-Chelmsford regime, the caballing of the Secretaries and heads of departments with the Governor made the position of the Ministers hollow and their authority unreal. The direct access of these officers to the Governor is in the new regime also a serious limitation upon the authority of the Ministers and upon their responsibility to the Legislature.

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* Sec. 59(4).

CHAPTER XIX

PROVINCIAL LEGISLATURE (BI-CAMERAL SYSTEM)

In the chapter on provincial autonomy the limitations subject to which the provincial legislature has to exercise its authority and jurisdiction have been noticed. It is time to see how this legislature is constituted and how it exercises the functions vested in it. Under the Montagu-Chelmsford reforms, all the provincial legislatures were uni-cameral in structure. But out of the eleven Governors' Provinces, six are required by the new Constitution Act to have bi-cameral legislatures. Assam, Bengal, Bihar, U.P., Madras and Bombay have double-barrelled legislatures while in the Punjab, North-Western Frontier Province, C.P., Orissa and Sind the legislature is uni-cameral.*

When the Montagu-Chelmsford constitution had been worked only for a short period and the legislatures had finished only one term, a group of members of the Indian National Congress decided to enter the Legislative Councils. Although the franchise was not very widely extended, most of the general constituencies returned in the second general election only their nominees and in some of the Councils they acquired a decided majority. Now not only in political ideals but in social and economic principles also many of the Congress

* Sec. 60(1).

members were regarded as levellers. Their attitude naturally spread apprehension among those people who had vested interests in the country. Gradually socialist and communist groups also sprang up in the country and their ideals began to permeate a large section of the people. Demands went forth not only for improving the status of the tenants but practically for revolutionizing their relations with the zemindars. This inevitably alarmed those people who had a stake in the country. They had every reason to expect that under the new constitution which would replace the reforms of 1919, franchise qualifications would be much lowered, the nominated element in the Councils would be eliminated and the representatives of the special constituencies and vested rights would bear a very small proportion to the total strength of the legislature. Their outlook therefore became pessimistic and when the Simon Commission arrived in India they demanded in their evidences before this body that there must be a second chamber in the provincial legislature so that it might be an effective check upon the freaks of the lower house. The zemindars, talukdars, planters and Europeans demanded in a chorus that the legislature in the provinces should no longer be uni-cameral.* There must be an opportunity for appeal from Philip drunk to Philip sober. There must be a chamber which might be appealed to against the hasty and

* The British Indian Association, the European Association, and the Planters were the most prominent in demanding the creation of an Upper House.

revolutionary decisions of the popularly elected house.

The Simon Commission did not really commit iteslf to the establishment of a second chamber in the provinces.* Some of the members were in favour of maintaining the unicameral system while others wanted the legislature to be a bi-cameral one. The question was referred to the Provincial Constitution Committee of the Round Table Conference for discussion and decision. It recognised that in some of the provinces conditions were such as to make a second chamber desirable and necessary. In Bengal, Bihar and U. P. opinions had been definitely expressed in favour of bi-cameralism and consequently in these provinces second chambers might be set up without further consultation. But until such opinions were expressed in other provinces, it should not be established there.† The British Government in its constitutional proposals which were embodied in the White Paper wanted accordingly to establish bi-cameral legislatures in Bengal, Bihar and U.P. leaving the mono-cameral system intact elsewhere. It was clear that in the interests of the zemindars and talukdars double-barrelled arrangement was being proposed in the three provinces. But the vested interests in the other provinces also gradually came forward to demand the boon which was proposed to be conferred in the first instance only upon the above-mentioned

* Report, Vol. II, pp. 98-100.

† Report of Sub-Committees, p. 48.

three provinces. So at last Madras, Bombay and Assam were also brought into the circle of bi-cameralism. Assam's entry into the ring is particularly due to the insistence of the planters of that province.

The question of second chamber in the federal legislature has been discussed in a previous chapter. While this body can be regarded as of doubtful utility and dubious necessity, such an institution in the provinces can be considered only as a fifth wheel in the legislative couch. There was really no necessity for such an addition to the legislative structure either for the enactment of healthy and efficient laws or for putting a stop to rash and hasty measures. In the federal units of the United States of America the legislatures are of course all of them bi-cameral in structure. But this is not because a second chamber is still of material use and service but because such chambers have existed there for a long time past. Out of reverence for tradition and not out of necessity they have still been maintained. It should also be known that in the United States the Central Government enjoys only some delegated functions while the residuary functions are vested in the Governments of the States. This meant till the other day that the Central Government was only an exception and the State Government was the rule. When the legislatures of the States were invested with such onerous duties, it was not uncalled for that they should be bi-cameral in form.

In the Dominion of Canada however the jurisdiction of the Central Government has all along been wide and that of the Provincial Governments

correspondingly narrow. All the provincial legislatures except that of Quebec have therefore gradually become mono-cameral in form. It has not been thought essential that for the discharge of the functions which are vested in the provincial legislatures they should consist of two houses. In the Commonwealth of Australia the legislatures in the States are bi-cameral but the second chamber there has been more a handicap than a help. The quarrel between the two houses has been frequent and their disagreement has convulsed society more than any imaginable hastiness on the part of a mono-cameral legislature could ever have done. In Queensland the people became really so disgusted with the squabbles between the two houses of its legislature that they abolished the second chamber in 1922.*

With such experiences of other countries before us, it would have been wise not to insist upon the constitution of a second chamber in our provincial legislatures. The functions of these bodies here though important are not too many. Consequently when any measure touching upon a particular subject is before the popular house, it is unlikely that it will be dealt with in a hasty and haphazard fashion. There is rather every likelihood that it will be discussed in as threadbare a fashion as possible. There is in fact no risk of the lower house being ever so glutted with business that there will not be in consequence any proper attention

* A. B. Keith, *Responsible Government in the Dominions* (2nd Ed.), Vol. I, pp. 460-462.

paid to important measures. Secondly, it should not be forgotten that there is no important interest in a province which is not separately and adequately represented in the lower house. When any measure touching upon any particular interest is taken into consideration on the floor of the house, its representatives have ample opportunity of either supporting or assailing it. Their case cannot go by default. If their case is a strong or even a plausible one, it is likely to have the support of the representatives of some other vested interests as well.

Now if this case so properly and powerfully presented was turned down and a subversive measure passed by the majority in the Assembly, the Governor of the Province would have in all likelihood withheld his assent from the bill. The Governor occupies the crucial position in the constitutional organisation of the province and he may be regarded as a vital factor in the legislative mechanism. It is a part of his special responsibility to protect the interests of the different minorities, cultural, religious, or economic. So if at all a subversive measure were passed by the popular Assembly, there was very little risk of its being placed upon the statute book. The Governor in fact is expected to constitute as great a check upon the enthusiasm and exuberance of the popular chamber as in other parts of the world the upper house happens to constitute. In the face of such an important role assigned to the Governor in the legislative organisation, the constitution of a second chamber was positively a superfluity.

The establishment of an upper house in six provinces has only added to the complexity of legislative procedure in these parts of the country. Not only it will cause inordinate delay in the passage of bills through the legislature but the conservative character of the upper house may make the passing of even a very necessary Bill sometimes next to impossible. The second chamber may constitute in some cases at least a permanent veto upon even moderate changes in social and economic systems of the provinces concerned. Besides none of the provinces have a very long purse. Some of the provinces which have been burdened with a second chamber are in fact confronted with the problem of making two ends meet. The establishment of the second chamber has however entailed considerable expenditure. The maintenance of the staff as well as the halting and travelling allowances of members of the Legislative Council will involve a considerable expenditure. This unnecessary expense the provinces might have been very well spared. The supply of able and public-spirited people who may faithfully discharge the duties of senators is also not unlimited in any of the provinces. The numerical strength of the Council of State, the Federal Assembly, and the provincial Legislative Assembly has been considerably increased. After returning members of the requisite calibre and experience to these houses, it is doubtful if any remnant will still be left from which persons of true senatorial dignity, experience and probity may be chosen. The first elections to the provincial upper houses do not of course offer us much hope in this

direction. As days roll on, the second chambers may prove only to be a costly and mischievous luxury. It would have been statesmanlike to resist the demand for its esablishment and continue in all the provinces the old uni-cameral system.*

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* See the *Problem of a Second Chamber for the Provinces* by N. C. Roy in the *Modern Review*, July, 1933.

CHAPTER XX

PRROVINCIAL LEGISLATURE (LEGISLATIVE ASSEMBLY)

The lower house of the provincial legislature is known as the Legislative Assembly and where there is an upper house it is called the Legislative Council. The strength of the Assembly varies from 50 to 250. The lowest figure applies to the North-Western Frontier Province and the highest to Bengal.

The principle of nomination has been entirely abandoned in the constitution of the Legislative Assemblies. Every one of the members is now elected by one or another constituency. None may have a seat in this body by virtue of the nomination of the Governor. The official bloc which was a feature of the old Legislative Councils has been removed and the bloc of nominated non-officials has also disappeared. The normal tenure of office of the old Legislative Councils was three years. But the life of the present Legislative Assemblies has been fixed at five years.* This period appears to be too long. True, expenses for election are great and difficulties for canvassing large and scattered constituencies are immense. It is therefore good that a reasonably long tenure of office should be granted to those persons who after getting over

* The Governor of course may dissolve it before the expiry of the scheduled period and may extend its life beyond this period.

these difficulties and spending such a large amount of money have been returned to the Assembly. Five years however constitute too long a term.

In Great Britain, legally the House of Commons is elected at a time for a period of five years no doubt but actually it has seldom in normal times existed at a stretch for five years. Except in fact in war time, it has always been dissolved and fresh election invited long before the expiry of the scheduled period. In France, the Chamber of Deputies is elected at a time for a period of four years. It may of course be dissolved before the expiry of this period. But actually there was such a premature dissolution only once. So it may be said that the French practice in respect of the actual tenure of life is the same as the English practice. In fact it is the verdict of experience that an assembly elected by the people cannot truly represent the opinions and feelings of its electors for over four years. The feelings which imbue the mind of the people at the time of an election gradually change and in normal times after the lapse of about four years they completely disappear and are replaced by other feelings and opinions. This happens in the case of quite a large section of voters. The representatives elected four years back are however bound mostly by their election pledges alone. In them are seldom reflected the changes which have been in the meanwhile effected in the popular feelings. They become in fact out of touch with the new opinions that sweep over their constituencies. It would have been better therefore if the tenure of life of the provincial Legis-

lative Assembly were extended to four instead of to five years.

The Assembly is constituted on the basis of communities and interests. The economic interests like those of the traders, industrialists, planters, landholders and labourers, the cultural interests like those of the universities, the racial interests like those of the Europeans and Anglo-Indians and the religious interests like those of the Christians, the Sikhs and Mahomedans are separately represented in the Assembly. Some of the castes of the Hindu population have also been scheduled on the ground of their social backwardness and out of the general seats several have been reserved for these depressed classes. Each of the interests referred to above has been allowed by the constitution to elect its own representatives from among its own members to the Assembly (for the special procedure of returning depressed class representatives see below). Persons are returned to this body not as representatives of all the people in a particular district of the province. But they are returned only to represent the view-points of a particular class and stand by the interest of a particular section in the Assembly.

The representation of the Hindu and Moslem interests in the different legislatures under the Act of 1919 was determined according to the provisions of the Lucknow Pact. It was an arrangement arrived at between the Indian National Congress and the Moslem League in 1916. The signatories to the Pact accepted the principle of separate representation of the different communities in the

Legislative Councils and agreed to a particular proportion of seats in these bodies. When the Government of India Act, 1919, was in operation for some time, its provisions as to the representation of different communities were assailed both by the nationalists and by the communalists. The former condemned them on the ground that separate representation was undermining national solidarity and driving people of different communities into water-tight compartments. The communalists on the other hand regarded the system of separate representation as essential for the preservation of their own culture and the protection of their own interests. But they condemned the proportion of seats allotted to them under the Lucknow Pact. The Moslems especially demanded that in those provinces in which they constituted the majority of the population, seats should be distributed in the legislature among the different communities according to their population strength. But in the provinces in which they were in a minority it would not be enough that their seats in the legislature should be in proportion to the strength of their population. They must have some weightage.

The Simon Commission which reported in the middle of the year 1930 could not recommend the abolition of the principle of separate representation. It regarded its continuance as still necessary.* But just as in this matter of separate representation the Commission did not depart in its recommendation from the existing practice, so also

* Report, Vol. II, p. 60.

as regards the proportion of seats it did not recommend any revolutionary change.* The recommendations of the Simon Commission were however still-born. The Round Table Conference was called to meet at London and the question of representation of the different communities and interests was re-opened. The subject was assigned to the Minorities Sub-Committee for discussion and decision. The Committee entered into a long discussion of several plans for the settlement of the communal tangle. But nothing came out of these discussions. They proved to be entirely abortive. When the second Round Table Conference opened in London in 1931, this question was taken up afresh for discussion. Mahatma Gandhi was representing the Indian National Congress in this Conference. He was however confronted by a Minorities Pact. The Moslem, the European, the Indian Christian and the Depressed Class delegates to the Conference entered into an agreement with regard to the principle of representation which they favoured and the proportion of seats which they demanded for their respective communities and interests in the different legislatures.

Dr. B. R. Ambedkar, the depressed class leader of Bombay, had already in his evidence before the Simon Commission argued in great details that the depressed classes were not really an integral part of the Hindu community. He even denied that they were Hindus at all. With very little in common with the caste Hindus, they should have, for the protection of their interests,

* *Ibid*, p. 71.

separate and adequate representation in the legislatures on their own account. Mahatma Gandhi however refused to recognise him as the true leader of the depressed classes in the Round Table Conference. He in consequence gave up all attempts at compromise with the delegates of the caste Hindus over the question of the representation of his own people and joined hands with those European and Moslem delegates who were at the time chalking out the Minorities Pact.

The demands of the signatories to this Pact were violently in conflict with the ideals of most of the Hindu delegates. A deadlock was thus reached in the Conference over this issue. There was now no chance of its being settled by the Conference. The delegates of the different communities became at last tired of interminable wrangling over the subject, and decided to submit the issue to the arbitration of the Prime Minister, Mr. Ramsay MacDonald. He was called upon to settle the question of the representation of the different communities and interests in the legislatures by an award. The Prime Minister accepted the invitation held out to him by the Indian delegates to the Round Table Conference and soon put himself in communication with the different Governments in India. He received in time their recommendations on the subject. After a due consideration of these opinions and views, he made an award and announced it in the autumn of 1932.

This award has now become a veritable apple of discord among the different communities in India. It is being vehemently assailed by the

Hindus in Bengal and the Punjab and by the nationalists everywhere in India and it is being as vehemently supported by the Europeans and Moslems. The award provided for the separate representation not only of the Moslems, the Europeans, the Anglo-Indians and the Indian Christians but also of the depressed class Hindus. These latter would have a number of seats allotted to them in the different legislatures and these seats they would fill by representatives chosen by themselves from among their own number. For purposes of representation in the legislatures the depressed classes would thus be regarded as a group definitely distinct from the main body of the Hindus.

Mahatma Gandhi was at the time in Yervada prison in Poona. To him the award came as a shock, almost as a bolt from the blue. He could not reconcile himself in any way to the principle of separate representation for the depressed classes. They had been wronged no doubt by the caste Hindus for centuries. But they were all the same part and parcel of the Hindu community, and the provision for separate representation for them was in his eyes nothing but an attempt at vivisection of the Hindu body. He must therefore oppose it with all the strength he could muster. The method of opposition was his own. One morning all India was startled to learn that Gandhiji had resorted to fasting and had threatened to continue it till he died unless meanwhile the provision for separate representation of the depressed classes was withdrawn. All eyes were now directed towards the Yervada prison. Attempts were made to influence the Prime

Minister by cables. But it was a provision of the award that it was not to be changed within ten years unless the community affected by the change was agreeable to it. It was therefore necessary to persuade the depressed class leaders to agree at least to as much modification of the award as might save the life of Gandhiji.

Dr. Ambedkar who had not been recognised in London as the leader of the depressed classes now found himself not only approached but feted and lionised by the Congress leaders. He was taken to Poona and persuaded to agree to a compromise. It was arranged that in some of the legislatures particularly in that of Bengal the seats reserved for the depressed classes would be considerably increased. After considering all the facts and figures bearing upon the subject the Prime Minister in his award had considered it just to reserve only ten seats for the depressed classes in the Bengal Legislative Assembly. It was now decided to raise the number from ten to thirty. On this condition Dr. Ambedkar agreed to the modification of the principle of separate representation.

It was decided that for every seat reserved for the depressed classes four depressed class candidates would in the first instance be chosen by the depressed class voters alone. These four candidates would be required to approach the joint constituency of both caste Hindu and depressed class voters and one who would come topmost in the poll taken in this joint electorate would be returned to the legislature. Thus a system was arranged which was very cumbersome no doubt but which provided

for the selection of those representatives who would not be quite out of control of the depressed classes themselves nor would be quite unacceptable to the caste Hindus. The compromise to which both Mahatma Gandhi and Dr. Ambedkar agreed was accepted by the Prime Minister and was embodied in the award.

The principle underlying the award has been acclaimed as right and correct by the communalists and sectionalists. They are of opinion that India is *par excellence* a land of religious, social and racial groups. Allegiance which individuals owe to their community is more ardent and more staunch than the allegiance they owe to the wider association of the state. They are members of the state not as individuals but only through their social and religious groups. It is therefore only meet and proper that they should be represented in the organs of the state not as individuals but as religious communities and as social and religious groups. Secondly, it has been suggested that unless the communities which constitute only a minority of the population are given the right to elect by themselves their own representatives from among their own number, their interests might go by default. They have special culture to maintain and special interests to subserve. If however they are not given separate representation, there may be none or at best only a few in the legislatures to uphold their cause.

The opponents of the award however attack its underlying principle on the ground that it gives further stimulus to the separatist forces in the

country. Separate election has been held since the introduction of the Morley-Minto reforms. Under the system of 1909 however election was indirect. Consequently the separatist influence which election through separate electorates naturally engenders could not permeate the masses. But the separate elections held under the Act of 1919 succeeded in driving the different communities wider apart and in embittering their relations in an increasing degree. Election through separate electorates makes it impossible for any of the candidates to take up a nationalistic line of activity. Even the publicists of confirmed nationalistic opinions had to assume communal colour and uphold communal ideals as otherwise they would be hopeless as candidates during the elections. Whenever in fact the candidates proceeded to woo a communal constituency, they tried to outbid each other in emphasising their communal interests and magnifying their differences from the sister communities. Separate election has been proved by experience to be subversive of all nationalism and solidarity among the people. The continuance of this principle under the Communal Award may very well make India a land of warring communities.

The system of representation for the scheduled castes may not be under the Poona Pact as separate as the system introduced for the Moslems and several other minorities. But even this is bad enough. It is in the first place too complex and too cumbersome. The depressed class citizens who seriously stand as candidates for reserved seats are

required to face two elections in close succession. In the first election they are called upon to approach the scheduled class voters alone so that they may be chosen by them as candidates. In the second election the four candidates thus selected for contesting one seat have to seek the suffrage of the joint constituency of depressed class as well as caste Hindu voters. To fight one election in the circumstances in which elections are held in this country is difficult enough. But to fight two in quick succession constitutes too much of a strain both upon the hardest constitution and the longest purse. Voters are scattered in widely separated tracts. Communications are difficult if not impossible in many cases. The people are ignorant and usually unlettered. They are accessible only by personal canvassing. It may be imagined therefore what an expenditure of money the candidates are required to undertake and what an amount of trouble they are required to undergo in contesting the primary and final elections in quick succession. During the last elections in Bengal, the expenditure was of course cut short and much trouble was spared by there being no contest in the primary election in most of the constituencies. Not more than four candidates were in the field and consequently they had to be declared as candidates for the final election. But although in this particular election candidates were mostly chosen without contest and double election was avoided in the great majority of cases, still it may not be a precedent to be followed in the subsequent elections. The risk of facing a double election is always there.

It should also be emphasised that the provision for the primary election through separate electorate may be as subversive in its effect in the long run as the system of election through completely separate electorate happens to be in the case of the Moslems, Anglo-Indians and Europeans. In the primary elections the separatists have a chance of emphasising their view-points. In this election they may create sufficient bad blood between the members of the scheduled castes and the caste Hindus. The atmosphere may be in fact so created that only separatists can be elected as candidates. The mischief may thus be done long before the caste Hindu voters have the chance of coming face to face with these candidates. In the final election they may check to some extent their separatist ardour and influence the election of the least undesirable of these candidates. But even he may not be desirable enough from the nationalist point of view.

The Communal Award of the Prime Minister has been attacked not merely on the ground of the principle of separate election which underlies it. It has been attacked also on the ground that in the allocation of seats in the different legislatures it has not done justice to the legitimate interests of the Hindus and especially the caste Hindus. In Bengal for instance the Hindus are about forty-four per cent. of the total population of the province. In educational advancement, in economic progress, and in contributions to the growth of the province, they certainly hold a position of special importance. But all the same out of 250 seats in the Legislative

Assembly they have been allotted only 80 seats, including the two women seats. If seats reserved for special interests are not calculated and if seats allotted to different communal and racial groups are alone counted, it appears that out of 216 such seats the Hindus have only 80, the Moslems 119, Europeans 11, Anglo-Indians 4 and Indian Christians 2. In other words although the Hindus are 44 per cent. of the population, they will have in the Assembly barely thirty-seven per cent. of the seats. It may be argued that of the special seats reserved for trade, commerce, labour, etc., the Hindus will secure several and consequently in the full assembly they will have a reasonable share of the membership. This argument is also not tenable at all. Of the thirty-four seats reserved for special economic and cultural interests, 14 are earmarked for European commerce and industry. Of the remaining 20, one has been allotted to the Moslem Chamber of Commerce and about three or four other special seats the Moslems are always likely to secure. Consequently the Hindus are unlikely ever to fill more than 15 or 16 of the seats reserved for special interests. It therefore comes to this that out of 250 seats of the Assembly, the Hindus may secure according to an optimistic calculation only about 96 or about 38 per cent. of the total membership of the Assembly.* This cannot be taken as an arrangement equitable and just.

* In the present Assembly they have 96 seats. The Moslems captured one University seat and two Labour seats.

It should be further borne in mind that of the 80 seats allotted to the Hindus, 30 are reserved for the depressed classes. The Simon Commission defined the depressed classes as those members of the Hindu community who caused "pollution by touch or by the approach within a certain distance."* Untouchability so defined has never been noticed on any extensive scale in this province. The Bengal Provincial Franchise Committee in fact calculated that the number of untouchables would not exceed seventy-two thousand in Bengal.† There have been other calculations of course but they vary as poles asunder. According to the calculation of the Hartog Committee there are about six million and a half of such people in this Presidency.‡ The Simon Commission however estimated the number of untouchables to be about eleven million or nearly fifty-seven per cent. of the Hindu population of Bengal.§ So the estimated number shifts from seventy-two thousand to eleven million. The one is certainly a far cry from the other.

The Simon Commission evidently deviated from its own definition of the depressed classes when it calculated their number. If this definition of untouchability were strictly and rigidly adhered to, many of the castes which were scheduled as depressed would have been excluded from the category. The very fact that the Prime Minister in

* Report, Vol. I, p. 40.
† Report of the Indian Franchise Committee, Vol. I, p. 117.
‡ Report, p. 218.
§ Report, Vol. I, p. 40.

his original Award reserved only ten out of the eighty Hindu seats in the Assembly for the depressed classes shows clearly that he did not pin his faith to the figures supplied by the Simon Commission in this connection. But at Poona all on a sudden the agreement was signed between Dr. Ambedkar and the followers of Mahatma Gandhi to the effect that in Bengal thirty out of the eighty Hindu seats would be reserved for the depressed classes. Gandhiji was then acting up to his threat and refusing all food. Everybody was eager to bring his fast to a close. When therefore the Pact was signed and he had opportunity of breaking his fast, people everywhere heaved a sigh of relief. The politicians in Bengal thought the moment inopportune to protest against the settlement which might undermine the interests of this province but which would be saving Gandhiji's life.*

The bad effect of this arrangement is obvious. In Bengal out of eighty members returned by general constituencies, thirty regard themselves as

* The atmosphere in which the Poona Pact was arrived at is graphically described by Mr. S. Sivashanmugam Pillai. "The representatives of the caste Hindus and the depressed classes met at Poona to arrive at a settlement. There was much higgling and haggling about seats. Even after two days' deliberations no compromise was arrived at. On the 2nd day at about 8 P.M. Mr. Devadass Gandhi rushed to the room where the representatives were sitting and made a scene. In the presence of the representatives he began to weep. Mr. Rajagopalachariar and others comforted him. Then he stood up and with tears in his eyes addressed Dr. Ambedkar as follows :— 'Oh Doctor is your heart made of stone? My father is in a precarious condition. He is vomiting and his head is shaking......Please save his life.' There was not a soul in that hall which was not moved by his passionate speech. The very next day the Pact was concluded." See Report of the Indian Delimitation Committee, Vol. III, p. 50.

the mouthpiece of sectional interests. This has the effect of driving another nail into the solidarity of the province. Again people who by education, tradition, upbringing, experience and sacrifice are the best fitted to represent the Hindu constituencies are debarred from standing as candidates for thirty out of the eighty Hindu seats in the Legislative Assembly. These thirty seats have to be filled by people who are only slowly emerging from obscurity. It may be pointed out that these people should have as much right to represent the constituencies as those gentlemen who are given the appellation of caste Hindus. But in the full-fledged of modern democracies also all men are not regarded as equally fit for filling public offices. In the civil services, in the army, in the judiciary and different other services those alone who have the necessary general and technical qualifications have any chance of being appointed. This rule may not apply with equal rigour to the representative institutions. But it has been found by experience that only those representative bodies happen to work efficiently and successfully, which include in their membership the enlightened and experienced citizens of the state.

The new arrangement in Bengal which is the outcome of the Poona Pact appears only to proscribe political talent and experience and put a premium upon ignorance and inexperience. In the Bengal Legislative Council constituted under the Act of 1919 there was only one depressed class member nominated by the Governor. But under the new arrangement there are thirty seats reserved

for these classes. The change is revolutionary and should have been avoided. As the qualifications for franchise have been lowered and the number of voters considerably extended, the influence of the depressed classes upon the election of representatives of the general (Hindu) constituencies would have been increasingly felt. If members of these classes who were really fit to represent popular constituencies stood as candidates, they would have as much chance of success as any candidate of the upper classes.* It is again inevitable that as education spreads, as economic conditions improve and as passion for public work grows, the number of such qualified persons among the depressed classes will gradually increase. A time therefore will come when the depressed classes may be, in respect of political ability and experience, on the same footing as the present higher classes. But till that day arrives it would have been wiser if a ban was not put upon talent and experience and if the number of depressed class representatives was not artificially increased to thirty.

As pointed out already all the members of the Assembly are, under the Act of 1935, elected directly either by territorial or by special constituencies. In the Franchise Sub-Committee of the Round Table Conference there was a proposal for making the election an indirect one. There was a demand for universal suffrage. But if this

* It is significant that in North Bakargunge where there was no seat reserved for scheduled castes, a member of such a caste was actually returned in the last election as a result of a straight fight with a prominent member of the upper classes.

demand for the extension of franchise was fully accepted or even if it was largely conceded the number of voters might be unmanageable. It was therefore suggested by Lord Zetland that the difficulty of approaching this huge number of scattered and mostly illiterate and ignorant voters might be avoided by the introduction of what he described as the 'Mukhi' system. Every twenty or twenty-five primary voters would, in their traditional informal fashion, select from their number one person as their delegate. The delegate would be called, according to the language familiar in many parts of India, the 'Mukhi' or the mouthpiece. The candidates for legislative seats would seek the votes of these Mukhis alone and would not be required to approach the legion of primary voters.

This suggestion attracted for a time considerable attention. But as its novelty was blunted by familiarity and as people had opportunity of reflecting upon its merits and demerits, objections to the plan began to multiply. The members of the Franchise Sub-Committee set their face against it and practically refused to give it any quarter. They recommended the appointment of an expert Commission which was asked to provide for an immediate increase of the direct electorate. To this end ten to twenty-five per cent. of the people were to be directly enfranchised. In addition to providing for this increase the Commission should consider the suggestion of introducing the 'Mukhi' system for the rest of the people who would otherwise remain without a vote.*

* Report, para. 4.

The expert committee was appointed with Lord Lothian as the Chairman and with Mr. R. A. Butler and Mr. C. Y. Chintamoni among the members. This Committee toured round India and enjoyed, in different provinces, the assistance and co-operation of Provincial Franchise Committees which were set up for advisory purposes. The Report of the Committee was submitted and published in 1932. It found itself unable to recommend the adoption either of the indirect system as it had been originally proposed by Lord Zetland or of the combined direct and indirect system which the Round Table Sub-Committee had called upon it to consider. Objections to indirect principle were many and insuperable. The pet suggestion of Lord Zetland was therefore turned down outright.* But the Committee recommended an extension of the direct electorate.

Every person who is assessed at income tax or is required to pay the Motor Vehicle tax, or has to pay either the municipal tax of not less than eight annas or union rate of six annas is now entitled to become a voter in a territorial constituency. Every person again who has passed the Matriculation examination may also be admitted to vote in such a constituency. The qualifications of the voters are indeed not uniform throughout India. But they differ from province to province only in minor details. Essentials laid down above apply to every province. It is only in the matter of the educational qualifications and with regard to residence that the differences are really noticeable. In Bengal anybody

* Report, pp. 21-28.

who has passed the Matriculation examination is eligible to be a voter. But if the Government so desires, it may lay it down that even those who have passed an examination not lower than the final middle school examination may also be admitted to vote. In U. P. however it is laid down straightway that anybody who has passed the upper primary examination will have the vote if he cares to apply for it in the prescribed manner. In the Punjab again the education which entitles a man to vote is required only to be of the primary standard. Not even the passing of the upper primary examination is insisted upon.

As regards residence again it is laid down that in Bengal not only the voter must have a place of residence in the territorial constituency but he must "ordinarily and actually" reside in that place. A gentleman may have a place of residence worthy to be called a palace in a particular constituency but if on business he has to reside elsewhere and may pay only infrequent visits to his residence, he is then liable to be declared ineligible for franchise in that constituency. In the United Provinces however the rule in this connection is more reasonable and fair. A person in these provinces may be regarded as resident in an area if he maintains a dwelling house therein ready for occupation and if he dwells in this house occasionally. In the Punjab the rule is more liberal still. Any person who has a family dwelling house or a share in such a house in a particular territorial constituency, is regarded as a resident in that constituency if this house has not been let on rent.

The extension of franchise which has been brought about by the Government of India Act, 1935, does not seem to have satisfied every section of the public. In the Report of the Nehru Committee published in 1928 adult franchise was recommended to be the basis of representative government in this country.* The members of the Indian National Congress appear still to stick to this standpoint. Every adult of sound mind should in their opinion be entitled to vote. The vote is, they think, the inalienable right of every person and on no consideration he or she should be debarred from this privilege. But this question should not be so lightly disposed of. The arguments against the immediate introduction of adult franchise are serious and weighty. Much importance is not usually attached to the responsibility of the voters. Those especially who advocate universal franchise today think very lightly of the voters' functions and duties. But really the voters constitute a most important factor of every democratic constitution. Upon their judgment in fact depends the character of the Government. No stream can ever rise above its source and no representative system can be honest, efficient and successful unless the voters themselves are honest, straightforward, discriminating and vigilant. In our country where the representative institutions are of so recent origin it is more necessary than elsewhere that they should be based upon an electorate which may be approached without difficulty and which may exer-

* Report, pp. 92-93.

cise some discrimination in the choice of their representatives. Already a risk has been taken by the wide extension of franchise undertaken under the Act of 1935. Not only a person who pays six annas as chowkidari tax is himself a voter but his wife becomes *ipso facto* entitled to vote. During the last general elections a considerable body of qualified persons had not their names duly registered in the electoral roll. But still in many of the constituencies the candidates had to face the difficult task of canvassing upwards of seventy-thousand voters scattered over a far-flung area. It may be imagined how impossible will be the task of the candidates if further extension of franchise is decided upon.

The enfranchisement of women on a liberal scale has complicated the electoral machinery to a considerable degree. Under the Act of 1919, women were not granted franchise straightway.* It was left to the different legislatures to decide by resolution whether in elections to these bodies women would be entitled to vote or not. Some of the Legislative Councils decided in favour of women franchise soon after they had met for the first time in 1921. The Councils of other provinces however proved to be more conservative in this matter and women were not enfranchised in these provinces till several years later. The Bengal Legislative

* The Franchise Committee which was appointed in 1919 under the Chairmanship of Lord Southborough set its face against the enfranchisement of women—Report, para 8. The Joint Committee however recommended that the matter should be left to the discretion of Indian Legislatures.

Council, *e.g.*, threw out the resolution which was moved in 1921 * for conferring franchise upon women. But although in some of the provinces the Legislative Councils were in the beginning opposed to women being enfranchised, in the course of the next few years they were given the vote everywhere.

Under the Government of India Act, 1935, the number of women voters has been considerably extended. Women are not only eligible to vote by their own right on the same terms as men, but a woman may be a voter irrespective of qualifications provided only she is the wife of a person who is himself eligible to be a voter. As pointed out already this extension of franchise among women has made the task of managing the elections far more difficult. For the last few years there has been indeed an awakening among Indian women on a scale that was almost unthinkable even two decades ago. But admittedly and inevitably this awakening is confined to those women who have in one way or another obtained the light of education. The rest of our women are still behind the purdah in some of the provinces and everywhere they are more backward than even men are. By enfranchising them along with their husbands, the electorate has been made not only vast in size but more unintelligent in character. The difficulties of the candidates have been many times enhanced. To approach the women voters is almost out of the question in many cases. To have their votes recorded is another task that baffles the efforts of all honest men. It is

* See Proceedings, Vol. IV, p. 314.

the experience of all persons who know anything of the elections that impersonation does not take place so brazenfacedly and on so large a scale anywhere as in the female booths.

In theory the equal right of women may be admitted at once. But in practice its recognition should certainly depend upon circumstances. It would have been better in any event if for twenty years to come franchise was confined only to those women who had some definite educational qualifications to their credit and who had some definite amount of property by their own right.

Anyway the difficulties created by the recent extension of franchise are already considerable and they should not be made overwhelming by further addition to the electorate.

CHAPTER XXI

THE PROVINCIAL LEGISLATURE (LEGISLATIVE COUNCIL)

The membership of Legislative Councils is small* in all the provinces in which they have been constituted. The chief advantage of small bodies is that debates on their floor may be more free and full than in the more numerous assemblies. This advantage the Legislative Councils in the provinces happen certainly to enjoy. It is expected that Bills introduced in these chambers or sent up to them from the lower houses will, on all occasions, have an opportunity of a thorough discussion and a minute revision.

The Legislative Councils are constituted roughly on the same communal basis as the lower houses. The proportion which is observed in the distribution of seats among the different communities in the Legislative Assembly is as far as practicable maintained in the Council as well. In fact between the first and second chambers there is hardly any difference in this respect. At one time some Hindu publicists advocated the establishment of second chambers in provinces like Bengal with the expectation that it might constitute a check upon the communalism, which, they were afraid, might

* See the Chart.

characterise the proceedings of the Legislative Assembly. But this expectation has ben belied. The communal balance in the two chambers is almost the same and it is unlikely on that account that one will ever be, in any way, a healthy check upon the vagaries which the other may show in communal questions.

The members of the Legislative Council are partly elected by the general (Hindu) territorial constituencies, partly by the Mahomedan territorial constituencies, partly by the Europeans and a few are nominated by the Governor. In two provinces (Bengal and Bihar) a good portion is again elected by the members of the Legislative Assembly. In Bengal out of a maximum of 65 seats in the Council 27 are filled by election by the lower house and in Bihar out of a maximum of 30 seats 12 are so filled. The lower house in electing these members has to follow the method of single transferable vote. It was expected that as a result of election according to this method the communal proportion of the Assembly would be faithfully reproduced in the upper house. But in the last election voting did not take place strictly along communal lines. This would certainly have been a matter for rejoice if some ugly rumours were not persistently current at the time of election. In a number of cases only those persons who were supposed to have spent money liberally, were elected irrespective of their communal affiliations.*

* We are told that votes were sold at the rate of Rs. 1,000 each. See the *Ananlabazar Patrika* of 3-3-37.

In Norway the members of the upper house are all elected by the lower chamber. This practice attracted considerable attention in Great Britain and the advocates of reform for the House of Lords have recommended this method for the constitution of the reformed upper house of the British Parliament. The Conference over which Lord Bryce presided in 1917 and 1918 was of opinion that three-fourths of the members of the reformed second chamber should be elected by the House of Commons. Publicists like Mr. H. B. Lees-Smith and Mr. and Mrs. Webb have also approved of this plan for constituting the second chamber. But however suited this method may be to English environments, there is no doubt about it that the working of this arrangement has been so far most unhappy in this country. It is not known exactly why this experiment was confined to Bengal and Bihar. But it may be pointed out in a categoric manner that the experiment has failed and not only the principle of this kind of indirect election should not be extended to other provinces but it should be withdrawn from the provinces of Bengal and Bihar as well and their upper houses should be constituted in the same manner as elsewhere in India.

While from the communal point of view the upper house has approximately the same complexion as the Assembly, otherwise the character of the two houses differs to a considerable degree. The members of the Assembly representing the popular territorial constituencies naturally reflect the temper and outlook of the common people by whose votes they are returned. But the members of the Legis-

lative Council, returned by the territorial constituencies are not only required to be themselves men of substance but they are also required to represent, and conform to, the opinions of those highly propertied persons who alone are admitted to the vote for this purpose.* It is but inevitable therefore that these members should be as much conservative in their outlook and policy as men with a considerable stake in the country are, as a rule, expected to be.

In the two provinces of Bengal and Bihar some persons of radical views have entered the Legislative Councils no doubt through indirect election by the lower houses. But the atmosphere of the upper chamber will in time chill their zeal and damp their enthusiasm and fervour. It will be no discredit to them if they are compelled to shed their old extremism in course of a few months. Their presence in the Council chamber is in fact not likely to modify its conservative character in the least. As regards the persons nominated by the Governor, they are of course invariably expected to be conservative in outlook and principles. Lastly it should be remembered that not only the members are elected or nominated for the long period of nine years, but the Council itself is a perpetual body and is not subject to dissolution. One-third of its members is to retire every three years. (In order to give effect to this arrangement, in the first election and nomination to the Council, one-third has been chosen for nine

* Those who pay income tax on an annual income of at least Rs. 5,000 or pay corresponding land revenue are admitted to the vote.

years, one-third for six years and the remaining one-third for three years.) The long term of office of the members tends to make them to some extent conservative in outlook. The fact again that all the members will not be chosen at the same time will tend to make the Council as a whole less responsive to public opinion. So the temper of the Council must differ considerably on all occasions from the temper of the Assembly. In the latter the generality of members will be inclined towards a change of the social order but in the former the generality will be in favour of maintaining the status quo.

In Great Britain it has been for some time the opinion of different sections of the public that a second chamber should exercise no jurisdiction over money Bills, should enjoy only limited authority over other Bills and should be mainly utilised for purposes of general debate and technical revision of the Bills sent up from the lower house. Although, in other words, the utility of the second chamber as a legislative organ is not denied, yet it is relegated to a position of circumscribed authority. But this principle has not been observed in the constitution of upper houses in India. In the Federal Legislature the second chamber has been given powers and functions which are in every way equal to those of the lower house. In the provinces also except in voting grants to the Government the Legislative Council enjoys co-ordinate authority with the more popular branch of the Legislature. The demands for grants are submitted to the vote of the Legislative Assembly alone and the upper house has nothing

to do with them.* The position of the Legislative Council is the same in this field as the position of the Council of State under the Montagu-Chelmsford reform and differs essentially from that of the Council of State which is to be set up on the inauguration of the Federation.

But although the Legislative Council in a province has no say with regard to supply, Bills of taxation like Bills of every other description require the assent of this house before they are submitted to the Governor for signature. Of course if the two houses differ and no compromise is possible between them, the Governor has authority to convoke a joint meeting of the two chambers and place before it the Bill in dispute for discussion and decision according to the opinion of the majority of members of this joint meeting.† It is true no doubt that in this joint body, the members of the lower house will outnumber the members of the upper chamber. But it need not be regarded as certain on this account that the measure will be decided in the joint meeting according to the views of the Assembly. The opponents of the measure in the lower house may now join hands with its opponents in the upper chamber and they together may be, on occasions, sufficient in number to defeat the measure. We saw already that the second chamber in a province was a superfluous body. But if it was, all the same, to continue, it ought to have been a mere revising body.

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* Sec. 79.

† Sec. 74 (Finance Bills can under Sec. 82 be introduced only in the Legislative Assembly).

CHAPTER XXII

THE CIVIL SERVICE

Parliamentary government is essentially a government by amateurs. Neither the members of the legislature who pass the laws of the realm and discuss and criticise the policy of the executive nor the members of the Cabinet who initiate the policy of the Government and superintend the execution of the laws can be described as experts in public administration. Some of them may have acquired an experience and shown a talent which an administrative expert may really envy. But in general it may be said that they have no grasp of those details of departmental work without which no policy can be framed and no law for its improvement may be initiated with success. The main utility of the Ministers who are chosen from the lay public consists in this that they are in touch with public opinion, know what the public wants and what is really good for the people, and may accordingly guide the policy of the departments over which they preside. Secondly, the Ministers bring to bear upon the administration of their departments a fresh mind and a wide outlook. Those who are outside the wood get a full view of the forest and those who are in happen to see only the trees. The experts in the departments are so accustomed to one kind of work and are so enmeshed in its details that they very

often lose a sense of proportion and fail to look at a question from a broad standpoint. The Ministers are not however burdened with this handicap. Their mind is fresh and they are expected to make good the defect.

Now, as Bagehot pointed out about sixty years ago, when fresh mind rules the fresh mind requires to be instructed. The Ministers may have a wide outlook, an excellent sense of proportion and proper knowledge of the needs of the public. But if they are to run the departments ably and efficiently, they must have the assistance and co-operation of a body of experts versed in the business of these departments. They are the tools without which a government however democratic cannot be run. But it should be known that although, in every modern democracy, the civil service may occupy an important position in the scheme of its government, yet its importance consists only in the efficiency with which it may serve the supreme governing body of the country. The ultimate responsibility for laying down a policy and putting it into operation is vested in the Ministers. It is for the civil service to help them with its expert advice in formulating and executing this policy. It is for the permanent servants in a department to acquaint the Minister with the different aspects of a particular problem and suggest the methods by which it may be satisfactorily tackled and solved. It is for the Minister then either alone or in consultation with his colleagues to accept this suggestion or make his own plan. Once the Minister has made up his mind and fixed upon a particular line of action, the

civil servants of his department have to do everything possible to give effect to it, no matter whether the plan was originally theirs or not. Problems of modern administration are so complicated and tangled that in most cases the Ministers have to depend upon their permanent assistants not only for the execution of their policy but also for the formulation of their plans and schemes. The influence of the civil service has considerably increased on this account, so much so that in Great Britain there have been protests against it from some responsible quarters. But it should be borne in mind that however great may be the influence of the civil service and however considerable its powers may be, constitutionally it is absolutely subordinate to the Ministers. To them the civil servants owe absolute responsibility and beyond them they owe no allegiance. They have to work and move behind the Ministers.*

In India the position of the civil services was, until recently, entirely different. Of these services, the Indian Civil Service has been the most important, the most powerful and really pre-eminent. There was a time when by the Civil Service this body alone was meant. Gradually other civil services were created no doubt but the primacy of the Indian Civil Service has still been maintained.

* *Cf.* The concern of the Civil Service "is with means and not with ends. Its business is to put at the disposal of the policy-determining organ exact and impartial knowledge and expert service. The expert civil servant is indispensable but indispensable as a servant, not as a master of policy." A. D. Lindsay.—*The Essentials of Democracy* (1930), p. 66.

Mr. Herbert Fisher, now Warden of the New College, Oxford, was a member of the Islington Commission on the Civil Services in India. In this capacity he had an excellent opportunity of estimating the actual position of the Indian Civil Service in the scheme of government in this country. In a lecture on Imperialism which he delivered in 1915 he gave it out as his opinion that in India " the Indian Civil Service is the Government."* Subject to the ultimate control of the British Parliament the policy of the Indian Government was framed by the Civil Service and its execution also was supervised by the same body. All the key positions in the Legislature, Executive and the Judiciary were occupied by the members of the Indian Civil Service. Very aptly and naturally could it therefore be identified with the Government of the country. The constitutional changes effected in 1919 and in 1935 have considerably altered the position of the Indian Civil Service no doubt. But it still enjoys considerable authority and enormous influence in the administration of the country.

The members of this body are the lineal successors of the writers and factors of the East India Company when this Company was solely engaged in commercial operations in this country. They were rescued from venality and corruption by the reforms which were initiated in the scale of their regular salaries and emoluments on the initiative of Lord Cornwallis. In 1793 when the charter of the Company was renewed for twenty years, the consti-

* *Studies in History and Politics*, p. 134.

tutional position of this civil service which came to be known by this time as the Covenanted Civil Service was considerably strengthened. It was laid down that all the offices under the three Governments of Bengal, Bombay and Madras would be filled by the members of this body.* So it practically became a close corporation entrusted with the administration of the three Presidencies. As however functions of government increased, it was found out of the question that all the offices, superior and minor, should be filled by members of the Covenanted Service. For minor offices at least outsiders had to be chosen. The offices of the *Munsifs* and *Sudder Amins* were created in 1824 and those of the Deputy Collectors in 1837. Both Indians and non-Indians were appointed to these posts. Some offices of the Company's Army were also placed on civil duty. These appointments were however regarded as irregular. They were looked upon as inconsistent with the provision of the Charter Act of 1793.

So in 1861 an Act† was passed by the British Parliament which reserved the superior offices under the Crown in India for the members of the Covenanted Service and threw open the minor offices to outsiders. The offices so reserved included the posts of District Magistrates, District Judges, Commissioners of Divisions, and Under-Secretaries, Deputy Secretaries, and Secretaries to different Governments and Administrations. Over and above

* See sections 56 and 57 of 33 Geo. III, cap. 52.

† 24 and 25 Vic., cap. 54.

these posts in the general administrative line there were other offices also reserved for the Covenanted Service. At least one-third of the Judges of the High Courts, a proportion of the Accountant-Generals, the Director-General of Post and Telegraph, the Inspector-Generals and Commissioners of Police and some of the officers of the Political Department were recruited from this body. In the Act of 1861 there was of course a provision that with the previous approval of the Secretary of State for India an uncovenanted officer might be appointed to an office reserved for the members of the Covenanted Service. By taking advantage of this provision some uncovenanted officers were promoted to a few superior administrative and judicial posts.

At present the superior offices in the Police Department are no longer held by the members of the Indian Civil Service. Twenty per cent. of the superior administrative and judicial offices in the districts and the Secretariats are also now filled by promotion from the lower services. But the remaining superior administrative posts in the districts and the Secretariats are still reserved for the members of the Indian Civil Service. Some of the Accountant-Generals and Political Officers are also recruited from this body. Besides, most of the superior new posts created recently are also filled by the Civilians. Two of the Trade Commissioners in Europe, Secretary to the Agent-General in South Africa, Development Commissioners in the provinces, some of the members of the Public Service Commissions are recruited from the Indian Civil Service. With the abolition of the Executive

Councils in the provinces the Civilians have ceased to be members of the Governors' Cabinets. But most of the Governors of provinces are still recruited from among their number. In the Central Government again so long as the Federation is not inaugurated, three of these officers will continue to be members of the Governor-General's Executive Council.' So the Indian Civil Service may still be described as the " steel-frame " of Indian administration.

Until the year 1862 this great Civil Service was exclusively a European body. In the Charter Act of 1833 there was no doubt a clause* that no Indian citizen should be excluded from this body only because of his religion, race and colour. For over twenty years however this noble clause was entirely disregarded till it was repeated though in a modified form by the Sovereign of England on her acceptance of the Indian Crown. But the Queen's Proclamation had for some time as much effect as the Charter Act of 1833. As we shall soon find there was then only one channel for entering into this Service—the competitive examination held in London. Indians were eligible no doubt for appearing in this examination. But in that age there were few among them who could make a journey to London after resisting the injunctions of their *shastras*, violating the traditions of their society, and incurring the risk of a heavy financial loss to their family. In 1862 however the late Mr. Satyendra Nath

* Clause 87.

Tagore, an elder brother of the poet, took the risk in both hands and appeared in the competitive examination. He secured a place in the list of successful candidates. That was the first intrusion of an Indian into what was then regarded as the sacred preserve of Europeans. But although a breach was effected in the wall of the stronghold, it was not certainly a dangerous one. A few Indians in different years might somehow glide through it but the storming of the citadel was out of the question. In fact about half a century later it was found that of the members of the Indian Civil Service only five per cent. were Indians.*

A Royal Commission on the Public Services in India was appointed in 1912 with Lord Islington as the Chairman. Among the members of this Commission were the late Mr. G. K. Gokhale, Lord Ronaldshay (now Lord Zetland), Mr. Herbert Fisher, now Warden of New College, Oxford, the late Sir Valentine Chirol, Mr. Ramsay MacDonald, and Sir Abdur Rahim, now the President of the Legislative Assembly. One of the objects of the Commission was to recommend the methods by which the Indian element in the Indian Civil Service might be increased. Before the report of the Commission could be ready, Mr. Gokhale was no more. The report was submitted in 1916 and published in the following year. Its recommendation on the principal subject could give no satisfaction to the Indian public. It had recommended that in addition to Indian recruitment to the I.C.S. through

* In 1911.

the London examination, 25 per cent. of the appointments to the Superior Civil Service posts should be made from among Indians partly by promotion from the lower service and partly by direct recruitment. To give effect to this scheme, it was thought necessary to recommend the holding of an examination in India. As pointed out already the competitive examination for the recruitment of the Civilians was held so long only in London. The Indians had demanded for over half a century that this examination should be simultaneously held in one or more centres in India. This demand hitherto unheeded was now conceded in a modified form.* Meanwhile Mr. Montagu and Lord Chelmsford were also chalking out the proposals of political reform which they soon embodied in their famous report and published in 1918. In this report they discussed the question of the Indianisation of the Indian Civil Service more favourably and sympathetically than the Royal Commission and proposed that immediately thirty-three per cent. of the recruitment to the Service should be from among Indian candidates.†

For about four years, Indian recruitment was regulated according to the principle laid down by Mr. Montagu and Lord Chelmsford. But the Indians wanted further to accelerate the rate of annual Indian appointment to the Civil Service. So when a Royal Commission was appointed in 1923 with Lord Lee as the Chairman to consider some important questions regarding the conditions

* See N. C. Roy, *Indian Civil Service* (Book Co., Calcutta), pp. 113-14.

† Report, para. 317.

of service of the Superior Civil Services in India, it was entrusted with the duty of considering afresh the question of Indianising the Indian Civil Service. The Lee Commission's Report was submitted in 1924 and its recommendations were immediately accepted and acted up to by the Government. Most of the Indian witnesses who had appeared before this Commission had emphatically given it out that further British recruitment to the Indian Civil Service would be unnecessary and unwise and should be discontinued. Even such a conservative Indian statesman as Sir Sivaswami Aiyer was definitely of this opinion. He pointed out that the Britishers already in the service would in many cases continue to serve India for twenty to thirty years more. It should be expected that during this long period India would make progress enough to do without British help in the Civil Service. Consequently if Britishers now continued to be recruited, there would be many British officers in the Service even at a time when India might not really require their assistance. It was therefore time that Indians alone should be recruited to the Indian Civil Service. The Lee Commission set its face against this proposal of discontinuing British recruitment altogether. But it recommended an increase in the proportion of Indian appointments to the Service. Its recommendation was to the effect that twenty per cent. of the appointments should be made by promotion of officers of the provincial civil services to listed posts. Of the remaining eighty per cent. of annual recruitment half should be British and half Indian. The Commission calculated that if

this principle was followed, there would be by 1939 an equality of strength between Indians and Europeans in the superior civil service posts.* As pointed out already this recommendation was accepted by the Government and appointments to the Indian Civil Service have been ever since regulated accordingly. But it should be added here that the calculation of the Lee Commission as to the proportion of Indian and European strength to be attained in 1939 has been falsified.† The Simon Commission calculated that if recruitment of Indians and Europeans was made on the basis laid down by the Lee Commission, there would be in 1939 still a far larger number of Europeans than Indians in the superior civil service posts. Equality of strength would still remain a distant ideal.

For about eighty years now the appointments to the Indian Civil Service have been made through the channel of a competitive examination. This method was adopted in 1853. Before this time however other methods were followed. The civil servants of the Company were at first recruited in the same way and from the same class of men as the writers and factors of old times. The Directors of the Company enjoyed all the patronage and they were entitled each to nominate two young men and send them down to India as Company's writers. Usually they nominated young cadets of their own

* Report, p. 19.

† The number of Indians in superior Civil Service posts is likely to be in this year 643 as against 715 Europeans. See Report of the Simon Commission, Vol. I, p. 270.

families or the sons and dependents of persons who had claims upon them. The young men so nominated were almost invariably boys of fifteen or sixteen, had usually little liberal education to their credit and had somehow picked up the rudiments of accounts in some institution on the eve of their nomination. Such men unless they were of unusual common sense and natural capacity were not likely to be equal to the duties that awaited them in India. They might be fit for keeping the books of the John Company when it was merely a commercial corporation. But they were certainly not in a position to cope with the responsible duties of District Officers and Judges, Secretaries to Governments and Ambassadors to the Courts of Indian rulers. So when Lord Wellesley came down to India as the Governor-General of Bengal, he felt the necessity of providing for some general and liberal education of the civil servants of the Company. In 1800 he therefore undertook the establishment of the famous College of Fort William. In this institution, the young civilians would be required as much to liberalise their mind and discipline their intellect by an acquaintance with the literatures and the sciences of Europe as to make themselves fit for their immediate duties by learning the Indian languages and picking up the threads of Indian civilisation. The Court of Directors could not indeed cry down the necessity of liberal education for the civil servants. But it did not approve of so comprehensive an institution which Lord Wellesley had projected and set up at Calcutta. The Court allowed the Fort William College to continue only as a seminary

for imparting instruction in Indian languages. Another institution was set up in England at Haileybury in 1806 to which all the cadets selected for civil employment in India were to be sent and where they were to pass two years in liberal studies. The patronage system was thus maintained no doubt and young men were appointed to the Civil Service in India only because they were connected with the Directors of the Company either by the ties of relationship or by those of friendship and obligation. But although they might be so appointed irrespective of their merit and qualifications their understanding was to some extent strengthened and their mind to some extent liberalised by two years' stay at Haileybury.

Duties of government were then comparatively simple and although there were many bad bargains among the Haileyburians, they discharged these functions not quite inefficiently. So for over a quarter of a century the people were reconciled to this arrangement. But from after 1830 the demand for the change of this system became increasingly insistent. In the first place it was pointed out that the interests of Indian administration called for a better selection of recruits to the Civil Service. Public administration in India as everywhere else were becoming more and more complex and none but the best men available in the country should be chosen to take up this responsibility. Secondly, it was thought that in the civil employment in India the friends and relations of the Company's directors should have no monopoly. It should not be the preserve of the cadets of a few fortunate families.

It should be thrown open to the British nation. If both the purposes in view were to be served, there was only one method of recruitment which could be successfully followed. It should be arranged that appointments were to be made to the Indian Civil Service only as a result of an open competitive examination held in London. Macaulay was the high priest of this principle of recruitment. With him as the chairman and with Benjamin Jowett, later the Master of Balliol, as one of the members, a Committee was appointed in 1853 to report upon this subject. The report of the Committee which was drawn up by Macaulay himself is the *locus classicus* on the subject of competitive examination as a method of recruitment to the Civil Service. The recommendations of Macaulay and his colleagues were accepted and acted up to from 1855.*

The examination thus initiated was held for three quarters of a century in London alone. But we have seen already that Indian public opinion demanded the examination to be held in some centres in India as well. For long the demand was resisted but at last the Islington Commission approved of the demand in some modified form and according to its recommendation with effect from the year 1922 an examination has been held in India as well. For the last fifteen years of course only a small proportion of Indian recruitment has been made through this examination. Indians have been

* With regard to recruitment see N. C. Roy, *Indian Civil Service*, Chap. II.

equally eligible for appearing at the examination in London and it is there that major portion of the Indian appointment has been made. But as a result of the Regulation issued in 1936 Indians except in a few cases will be ineligible for availing the London examination and consequently the examination held at Delhi will be the main channel of Indian recruitment to the Indian Civil Service.* It should of course be known that this examination will not be exclusively competitive. In order that all the main communities may be properly represented in the Civil Service it has been arranged that one-third of the Indian appointments should be reserved for the cadets of those communities which in the open competition will not secure their due share in the Service. These cadets may stand low in the examination but all the same they will be admitted to the service. So in their case the principle of competition will not strictly apply. It is in respect of the remaining two-thirds of appointments that the competitive arrangement will be rigidly in force.

We have already seen that most of the important appointments under the Provincial and Federal Government will be held by officers of the Indian Civil Service. But while these Governments will be obliged to depend upon them for the discharge of the primary administrative duties, they will not have full control over them. The members of the

* See an article on New Rules of Indian Civil Service Recruitment by N. C. Roy in *Modern Review*, June, 1936.

Indian Civil Service will receive their appointment as hitherto from the Secretary of State and will be liable to be dismissed only by the same authority.* Even in matters of ordinary disciplinary action they will be practically exempt from the control of the Ministers. Their transfer from one district to another or from one office to another will be regulated on the responsibility of the Governor. To the same functionary they will ordinarily look for promotion and reward for zeal and ability that they may have shown and from the same functionary again they will expect reprimand and punishment for slackness, indiscretion and inability. If however they think that they have been unjustly treated by the Governor, they will have the right of an appeal to the Governor-General and the Secretary of State. It is a part of the special responsibility of the Governor and the Governor-General to protect the rights and privileges of the members of the Indian Civil Service. And it is also a part of their duty to reprimand and punish them whenever necessary. But both these duties they will be required to perform in full responsibility to the Secretary of State who is the final authority in these matters. In other words although the members of the Indian Civil Service will be holding most of the key positions in the Secretariats and the districts, they will

* A resolution was carried in the services sub-committee of the Round Table Conference that although members of the Indian Civil Service would be recruited on an All-India basis, recruitment would be made only on the authority of the Government of India; see N. C. Roy,—*Indian Civil Service*, p. 239.

be to all intents and purposes exempt from the control of the Ministers and the Legislatures and will be only under the control of the Secretary of State and the British Parliament. The position of the Indian Civil Service will thus be anomalous and invidious in the new constitution.

CHAPTER XXIII

PUBLIC SERVICE COMMISSIONS

Public Service Commissions are an important and even a vital factor of civil service organisation in modern democracies. The establishment of such bodies is essential both for the first recruitment of civil servants on the basis of merit and for the protection of their legitimate rights and privileges during their tenure of office.

It was not however till the middle of the last century that such a commission was for the first time brought into being in Great Britain. Until 1853 the old patronage system was securely enthroned in this country. But opposition gained ground against the unwholesome characteristics of this arrangement, and in this year Mr. Gladstone, then Chancellor of the Exchequer in the Cabinet of Lord Aberdeen, gave an effective challenge to the system. He "commissioned Sir Stafford Northcote and Sir Charles Trevelyan to inquire into the organisation of the 'permanent civil service' and to report upon the best method of recruiting it." These two Commissioners submitted their report after a due enquiry on the 23rd of November of the same year. This report* constitutes the foundation upon which the structure of the existing civil service has been built. It was recommended that the

* Report on the Organisation of the Permanent Civil Service

entrants to the civil service should henceforward be chosen by competitive examination and the choice according to this method should be made by a Board of Examiners. " Such Board," the Commissioners suggested, " should be composed of men holding an independent position and capable of commanding general confidence." They recommended further that " it should have at its head an officer of the rank of a Privy Councillor."* The recommendation was given effect to one year and a half later. By an Order in Council of the 21st May, 1855, the Civil Service Commission consisting of three members with a tenure during the pleasure of the Crown was constituted.†

The example thus set by Great Britain was followed in later years by the U.S.A. and the British Dominions. In the United States up to the early eighties of the last century the principle of merit was not recognised in the choice of civil servants. The spoils system with all its attendant evils was enthroned at Washington. But a reaction which was already in the making came into full view when President Garfield was shot at and fatally wounded by a disappointed office-seeker. In 1883 an Act known as the Pendleton Act was passed by the Congress. It withdrew a number of federal offices out of politics and threw them open to public competition. It also provided for the establishment of a Civil Service Commission which would consist of

* *Ibid*, p. 11.

† C. 197. But although the Commission was set up, the principle of competitive examination for recruiting Home Civil Servants was not introduced till 15 years later.

three members, not more than two of them belonging to the same political party and none of them "holding any other official place." The Commission thus constituted was to aid the President in framing rules and regulations for the examination of the candidates and actually to hold the examinations and select the candidates thereby.*

In the Dominion of Canada also the patronage system could not but invite criticism and evoke opposition. A campaign was led by Sir Robert Borden for purity in the administration and this helped the passing of an Act by the Canadian Legislature in 1908, which introduced the principle of recruiting public officials by competitive tests. The statute provided for the establishment of a Board under the style of the Civil Service Commission and to this body was given the right to make appointments after holding the necessary examinations. The members of the Commission were to hold their office during good behaviour and were to be removed only when the two houses of the Dominion Legislature would present a joint address to the Governor-General to that effect.† In the Commonwealth of Australia, the civil service was organised on a non-political basis soon after the creation of the federation. At first the right to recruit the civil servants and safeguard their interests was vested not in a Board of Commissioners as in Great Britain, the U.S.A. and Canada but in a single Public Ser-

* Lewis Mayers, *The Federal Service* (1922), p. 49.

† A. B. Keith, *Responsible Government in the Dominions* (1928), Vol. I p. 200.

vice Commissioner whose office was created in 1902. But this arrangement did not certainly satisfactorily work, for twenty years later the Act was modified (in 1922) and a Board of three was substituted for the single Public Service Commissioner. The members of the new Board were given a short but renewable tenure of office. They were to be appointed for a period of five years at a time.*

Before the passing of the Government of India Act, 1919, there was no statutory obligation on the part of the Government in this country to set up any Public Service Commission. In fact there was no such body in India before 1926. The members of the Indian Civil Service were of course recruited in London through the British Civil Service Commission. But otherwise the services of this Commission were not available to India. The recruitment of other civil servants was made on the responsibility of the different Governments in this country and their future also was determined by them in their own way. The officers had no right of appeal to any impartial tribunal against any action of the Government, adverse to their interests. In some cases they could only appeal to a higher governmental authority against the decision of the lower. A member of the Indian Civil Service could appeal to the Secretary of State against any decision taken in respect of his future prospects by the Provincial and Supreme Governments. Similarly a Deputy Magistrate had an appeal to the Governor-General against some particular decisions of the Provincial

* *Ibid*, pp. 292-93.

Government. But the right of appeal to the higher governmental authority could on no account be so effective a safeguard against unjust treatment as the right of appeal to an impartial, independent and quasi-judicial body.

Mr. Montagu and Lord Chelmsford in their Report* on Indian Constitutional Reforms declared their intention to protect the interests of the services. They promised that "any rights and privileges granted or implied in the conditions of his (civil servant) employment shall be secured to him," in the new regime. But while they emphasied the necessity of protecting the legitimate interests of the civil servants, they did not recommend the establishment of any impartial tribunal for this purpose. This omission was made good by the Government of India in its first Despatch on constitutional reforms to the Secretary of State. It referred to the Public Service Commissions which had been established in the Dominions for protecting the permanent services from political influences. In India also "the prospect that the services may come more and more under ministerial control does afford strong ground for instituting such a body." Accordingly a provision was made in the Government of India Act, 1919, for the establishment of such an institution. Section 96C(2) of this Act provided for a Public Service Commission which "shall discharge in recruitment and control of the public services in India such functions as may

* P. 205.

be assigned thereto by rules made by the Secretary of State in Council."

For some years however no effect was given to this provision. There was a long drawn out correspondence on the subject between Whitehall and Simla, which however bore no fruit and India continued without a Public Service Commission. But the Royal Commission on the Superior Civil Services in India, which was appointed in 1923 under the chairmanship of Lord Lee of Fareham and which submitted its report early in the following year, put fresh emphasis on the subject of the permanent Public Service Commission. It pointed out that if the civil service was to be an efficient instrument of government, it must be protected from political and personal influences and given a position of stability and security. To this end it emphasised that "the statutory Public Service Commission contemplated by the Government of India Act should be established without delay."* After this it became out of the question for the Indian authorities to ignore the provision of the Government of India Act and continue sleeping upon the subject of the Public Service Commission. A correspondence which turned out to be of a protracted character was now opened afresh between Simla and Whitehall and it was not till two years later that a final decision was arrived at. On the 23rd of February, 1926, the Secretary of State in Council adopted some rules by a majority of votes regarding the constitution of the Public Service Com-

* Report, pp. 13-14.

mission. It was laid down that this body would consist of a chairman and four other members, at least two of the latter being chosen from among those who had been for at least ten years in the service of the Crown in India. The chairman was to receive Rs. 5,000 per month as his salary and the ordinary members Rs. 3,500. The Commission thus constituted was to take up its duties with effect from the 1st of October, 1926.*

The powers and functions conferred upon the Commission were advisory in character. It appears now that the long and protracted correspondence which was carried on between Simla and Whitehall for several years was connected mostly with the kind of duties which were to be assigned to the Commission. The Government of India wanted these functions to be strictly advisory in character. The Secretary of State was however opposed to the constitution of the Commission on such a limited basis. He wanted some executive powers to be conferred upon this body. At last the Secretary of State gave way and the point of view of the Government of India prevailed. It was however accepted by the latter that when the Statutory Commission would be appointed to investigate into the working of the Montagu-Chelmsford reforms, the Public Service Commission would have the right to plead before this body for the expansion of its powers, and the widening of its responsibilities. So for the time being at least

* This decision was announced in the Gazette of India of 29th May, 1926.

the Public Service Commission was set up with only advisory powers and without that controlling authority which had been contemplated in the Government of India Act (Sec. 96C), 1919.

The Commission was to act as the expert adviser of the Government of India in matters connected with the recruitment to All-India Services and the Central Services (Class 1). If a competitive examination was to be held for purposes of such recruitment, the Commission was to advise the Government as to the rules and regulations for these examinations and to make arrangements for holding such examinations, and declaring the results. In cases of recruitment by selection also, the Commission was to give similar advice as to rules regulating the qualifications of candidates and the submission of applications.

Apart from this work in connection with recruitment, the Commission was to advise the Government of India and the Secretary of State regarding the disposal of appeals which the civil servants might make to them against the disciplinary actions taken by the lower authorities. In case an officer made an appeal to the Governor-General in Council against an order of censure, withholding of promotion or suspension from duty by a lower authority, he was to consult the Commission before passing any verdict either way. The Commission was to study the relevant papers and then supply the Governor-General in Council with its expert and impartial advice as to the correctness of the step which had been taken against the officer by the lower authority. Once the Government of India was furnished with

the advice, it was for it to decide the case any way it chose. The opinion of the Commission was strictly to be regarded as a piece of advice and was not binding upon the Governor-General in Council. Similarly when the Governor-General in Council was to pass original orders withholding promotion from some officers, or reducing them to lower posts or suspending them from office, the Commission was to be approached for *advice* in such cases. Lastly, when the Secretary of State in Council was to hear some appeals in these matters, he might before disposing of these appeals call for the advice of the Public Service Commission through of course the Government of India.*

The Indian Public Service Commission has been considerably handicapped during the ten years that it has been at work because of the rigid limitation of its powers. Sir Ross Barker, the first Chairman of this body definitely pointed out in his memorandum to the Simon Commission that its powers were hopelessly inadequate and defective He of course did not complain that the Commission over which he presided had no powers in respect of the representation of the different communities and races in the public services. The distribution of offices among different communities was a political question with which the Public Service Commission might not have anything to do. But with regard to the methods of

* The powers and functions of the Commission were determined by rules framed by the Secretary of State in Council on the 22nd of September, 1926. See the Gazette of India of 16th October, 1926.

recruitment, the Commission and not the Government of India was, according to him, really competent to determine the rules. But actually it was the Government of India and not the Public Service Commission which decided as to whether recruitment to certain offices was to be made by competitive examination or by selection or by both. When again it was decided by the Government that appointments to certain offices would actually be made by competitive examination, it was not open to the Commission to decide on its own account the preliminary qualifications of the candidates who were to be admitted to the examination. The last word lay with the Government of India even in matters like these. The result was almost disastrous. Sir Ross cited one instance in which 'the Commission was compelled to examine a number of candidates who, owing to their low educational qualifications, had not the remotest chance of success. He also cited a case in which the Government of India objected to a syllabus for examination which the Commission has unanimously adopted after prolonged discussion. The interference of the Government in these matters was in fact as irksome as it was frequent. Sir Ross pointed out that this state of things should be brought to an end. Once the question of the representation of the different communities and races was settled by the Government, it should have nothing further to do with the question of recruitment to the public services. This duty must be performed by the Commission in its own way. A sum of four lacs of rupees was annually spent upon the Commission, but no return for this expenditure

would be available to the public unless the powers of the Commission were adequate.

The Government of India however in its evidence before the Simon Commission defended the existing relations between itself and the Public Service Commission. It referred to the fact that in quasi-judicial matters the Government of India had acted, in all instances, up to the advice tendered by the Commission. A convention had practically been developed to the effect that all disciplinary actions would be taken and all appeals made by the officers concerned would be disposed of only according to the recommendations of the Commission. But as regards the methods of recruitment of the officers and the rules for examining the candidates, the ultimate responsibility for formulating them must rest with the Government. The final appointment of the officers also must be made not by the Commission but by the Government. The public services played in India a specially important part in the life of the people and the organisation and structure of government. Consequently the Government of India would be unwise if it abdicated this responsibility.

Under the Government of India Act, 1919, there was no statutory obligation on the part of the provinces to have Public Service Commissions of their own. The Lee Commission however recommended that as the extension of the authority of the Central Public Service Commission in respect of the local services might be unacceptable to the Provincial Governments, they should establish Provincial Commissions by provincial Acts. The estab-

lishment of such bodies would go a long way towards ensuring due security to the provincial services.* The only province which acted up to this suggestion was Madras. It passed a Public Service Commission Act in 1929 and since then a Commission has been at work in that province with the same powers and functions in the local sphere as the Indian Public Service Commission in the All-India and Central spheres. The Punjab Legislative Council also passed an Act for the establishment of a local Public Service Commission but it was not given effect to.

Under the Government of India Act, 1935, it is compulsory as much for the Federation as for the individual provinces to have Public Service Commissions of their own. It is of course laid down in the Act that two or more provinces, instead of establishing separate Commissions on their own account, may combine in setting up one Commission for the discharge of duties in all these provinces. There may be an agreement also between two or more provinces to the effect that the Public Service Commission constituted by one would be allowed to serve the other provinces as well. Lastly, a particular province instead of having a Public Service Commission of its own may, with the previous approval of the Governor-General, request the Federal Public Service Commission to serve its needs.† But it is certain that all the major provinces will establish Commissions of their own and only very small pro-

* Report, pp. 8, 9 and 16.

† Sec. 264.

vinces are likely to collaborate with their neighbours in this matter. The North-Western Frontier Province for instance is combining with the Punjab in establishing one Commission to serve the needs of the two and Sind has combined in this respect with Bombay.

There appears to be an impression in some quarters that if every province cannot have a separate Public Service Commission of its own and if its needs are served by the Commission of the Federation or of another province, its autonomy will be seriously jeopardised. This impression is absolutely erroneous. The autonomy of a province is adversely affected only when an outside authority has opportunity of interfering in the administration of those subjects which are assigned to it by the Act. But it is not the function of a Public Service Commission of the Federation or of another province to poke its nose into its administration. Its duties are only to select the candidates for appointment to its civil services and to see that the legitimate interests of the civil servants are not undermined by political influences. These duties are to be performed as impartially and as independently as possible. Consequently it does not matter much if they are discharged by that Public Service Commission instead of this. In some cases it may be rather necessary that civil servants instead of being recruited by a local Commission should be chosen by the distant Federal body. The local Commission may be influenced too much by the feelings and prejudices that may temporarily get the upper hand in a province. It may even open itself to the subtle influence of the

Ministry in office. If in these circumstances the appointments are made, and the rights of the civil servants are protected according to the advice of the Central Commission which is immune from these influences, that will be to the good of the province and not to its detriment. It should also be known that the purse of all the provinces is rather slender and their reasources very limited. It therefore appears to be too costly a luxury for every province to maintain a Commission of its own.

The members of the Indian Public Service Commission have been so long appointed by the Secretary of State in Council, and the members of the Madras Commission by the Governor in Council of the province. But under the Government of India Act, 1935,* the chairman and members of the Federal Public Service Commission will be appointed by the Governor-General in his discretion and those of a Provincial Commission by the local Governor in his discretion. The Ministers in other words have been given no voice in the selection of these functionaries. Obviously it was thought that if the appointment was vested in the Government of India and the Provincial Government concerned, such men might have been chosen as would find it difficult to resist political pressure and might be overborne by political influences. The Commissions in such contingencies would possess little of those virtues of impartiality and independence without which these bodies would be only a mischievous encumbrance. The Governor-General and

* Sec. 265.

the Governors, placed above the clash of parties and the squabbles of communities, are on the contrary expected to choose only those persons as chairmen and members of the commissions who are qualified by experience, outlook and habits of life for these responsible positions.

The Governor-General and the Governors are by themselves to frame regulations regarding the number of members of the commission, their tenure of office and their conditions of service. In Great Britain the Civil Service Commission originally consisted of three members* and the number has since then varied between two and three. In the United States of America also the Civil Service Commission is constituted by three members and the same is the case with the Australian Commission. But the total membership of the Indian Public Service Commission including its chairman was fixed at five by the rules which the Secretary of State in Council framed in 1926. It is unlikely that the Federal Commission when set up by the Governor-General will be smaller in size. The solicitude of the Secretary of State in Council for the representation of different interests of the country on the Commission made it inevitable that it should be a fairly large body. It is expected that the Governor-General when he in his discretion frames regulations for the composition of the Commission will also have the same solicitude for this representation of various interests. He is not likely to deviate from the principles which have been enthroned for the last ten years. The Provin-

* See Order of Her Majesty in Council in C. 197, p. iii.

cial Public Service Commissions should have consisted of not more than three members in any instance. The composition of the Madras Commission might have been a precedent in this respect. But here also the demand of the different communal and racial interests for adequate representation may unnecessarily lead to the expansion of membership.

Under the rules framed by the Secretary of State in Council in 1926 it was laid down that at least two of the members of the Indian Public Service Commission must have served the Crown in India for at least ten years. Under the Government of India Act, 1935, it has not been left to the discretion of the Governor-General or the Governors to determine this question of the representation of the services upon the commissions as they choose. It has been made obligatory that one-half of the members must be recruited from among the senior members of the different services.* It is likely that if the Commission of a particular province happens to consist of three members including the chairman, the latter will be usually chosen from among the members of the All-India Services, one member will be chosen from the provincial services and the third member will be appointed from the local public life. Again in order that the different communities may be properly and adequately represented on the Commission, it is certain that at least one of the members will be a European, one a Hindu and the third a Mahomedan. In the Punjab a Sikh also will have in all contingencies a seat on the Commission. So the

* Sec. 265 (1).

Governors will have to observe practically two principles in making the choice of each member of the Public Service Commission. He will have to see if he belongs to this or that service, is a layman and he will have to see also if he is affiliated to this or that community.

Sir Stafford Northcote and Sir Charles Trevelyan, the two originators of the new scheme of civil service recruitment and control, observed in their report in 1853 that the Board "should be composed of men holding an independent position, and capable of commanding genèral confidence; it should have at its head an officer of the rank of a Privy Councillor."* So the members according to them might be appointed from any walk of life and might not necessarily have to their credit any particular experience or any special knowledge. What was most wanted was that they should be independent men and must inspire general confidence. More than sixty years later the Royal Commission on the Civil Service (presided over by Lord MacDonnel) made some modification ;in this recommendation. "In our opinion," observed Lord MacDonnel and his colleagues "the aim which should be kept in view by Your Majesty's advisers in the selection of the Civil Service Commissioners is to secure men possessing wide experience both of school and of University education to work under the chairmanship of a man of affairs possessing official experience as well as sympathy with academic studies."†

* Report, p. 11.

† Fourth Report (Ed. 7338), p. 84.

In the choice of members of the Indian Public Service Commission, we cannot say that these conditions were adequately fulfilled. The first Chairman, Sir Ross Barker, was of course a man of affairs, had official experience to his credit as the legal adviser of the Board of Education at Whitehall and was a man of wide cultural outlook. He was an excellent choice and fulfilled his duties with ample satisfaction to the public. The second Chairman however was regarded as a square peg in a round hole. Belonging to the Indian Police he was first made a member of the Commission and then promoted to the chairmanship on the retirement of Sir Ross. Neither his experience as an officer, nor again his general outlook and habits of life made his accession to the leadership of the Public Service Commission a very natural one. As regards the members of the Commission, it cannot be said that all or even most of them have had any noted sympathy for academic studies. At least one of the members of the commission has of course always been chosen from among experienced educationists. But this is not enough and when the Federal Commission will be constituted, the Governor-General will do well to attach greater importance to the cultural outlook of the members he chooses than heretofore.

In the Provincial Commissions if the Governors are wise, they will select the Chairmen from among those members of the Indian Civil Service who have kept themselves in touch with academic studies and are noted to have a wide cultural outlook. Such men are not yet very rare in this Service and if they

are placed at the head of the Commissions they will inspire at least some public confidence. The principle of communal representation observed in constituting the Commissions will of course be an impediment to their taking wide, impartial and independent view of the problems of recruitment. Lord Lothian who came to India as the Chairman of the Indian Franchise Committee (1931-32) gave it out as his definite opinion that as the duties of every such committee or commission were more or less of the judicial character, their composition on communal and racial basis became a great handicap to the right discharge of their responsibilities. While the committee would be expected to approach a question from an independent standpoint, actually the members chosen because of their communal affiliations pulled the strings from opposite ends. The result was that no question could be studied with calmness and with judicial balance. If this could be said of a committee like that over which Lord Lothian himself presided, it can be imagined how much more would the appointment of members on communal grounds be a handicap to the work of the permanent Public Service Commissions. But the distrust between the communities is still such, that if the Commissions were constituted only on a general basis, and did not consist of the mouthpieces of all communities they would not inspire any confidence. The community unrepresented on the Commission will cry down its work at every step. So, however defective the arrangement may be, we have to make the best of it.

In Great Britain the members of the Civil

Service Commission are appointed theoretically during the pleasure of the Crown but actually during good behaviour. In Canada also the members of the Commission hold their office during good behaviour. This gives them the desired independence. In India however, the members of the Indian Public Service Commission have been appointed so far only for a period of five years at a time. It is likely that this precedent will be followed both by the Governor-General and the Governors in constituting their Commissions. The appointment for so limited a period may appear to be inconsistent with the independence which the members of the Commissions are expected to exercise in the discharge of their duties. But although appointment for a short renewable period may be a handicap to them in this respect, otherwise it has much to commend itself to us. It makes it easy for the Governors to remove from the Commissions, after five years, those members who may not have discharged their duties with desirable rectitude and balance. On this ground the principle of appointment for a limited period may be supported.

We have already seen that the functions of the Indian Public Service Commission have been purely advisory all these years. The representation of Sir Ross Barker to the Simon Commission has borne no fruit whatever in this respect. It fell on deaf years. He pleaded only in vain for the extension of the powers of the Commission over which he had presided. Sir John Simon and his colleagues did not think it necessary to accept his standpoint and recommend any addition to

the powers of the Public Service Commission.* The powers and functions of both the Federal and Provincial Commissions will, under Section 266 of the Government of India Act, 1935, be practically on all fours with the powers and functions which the Secretary of State in Council assigned to the Indian Public Service Commission in 1926. The constitution of the Commissions on such a limited basis is surely a matter of regret. It would have been wise if, apart from deciding the communal proportions in the services, the Ministers had nothing to do with the recruitment of the civil servants. It ought to have been decided finally by the Commissions if particular offices were to be filled by competitive examinations or by selection and if for the competitive examinations this or that syllabus was to be set. The Governments ought not to have been given the final say in these matters. The appointments also ought to have been made finally by the Commissions according to this or that method as they thought best. As empowered now, they have authority only to recommend names which it will be open to the Ministry in some cases at least to accept or reject. It cannot be said with any degree of certainty that Public Service Commissions constituted on such a limited basis will be an effective instrument in making the public life honest and pure and the public services efficient and straightforward.

* Report, Vol. II, p. 295.

CHAPTER XXIV

THE JUDICIARY

" There is no better test of the excellence of a government," observes Lord Bryce,* " than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen." The courts of law are, in fact, a vital factor of the modern government. They are the guardians of the rights and privileges of the people against the encroachment of private persons and the aggression of the executive officers. They are not only to settle private disputes but also to bring under review executive action. The legislature may lay down good and wholesome laws. But they are of no avail if they are not executed both vigorously and equitably. Now it is for the judiciary to become the task-master of the executive. The judicial tribunals are to see that laws are not applied by the executive officers too harshly in one case and too leniently in another.

The highest tribunal for India to which cases may be carried in appeal is the Judicial Committee of the British Privy Council. The jurisdiction which it exercises over India is derived from the ancient prerogative of the King to hear appeals. The right conferred by this traditional prerogative

* Modern Democracies, Vol. II, p. 421.

to hear appeals has of course been strengthened further by the Judicial Committee Acts of 1833, 1844 and subsequent years. The Committee consists of all members of the Privy Council who have held high judicial office including the seven law lords, two salaried members with Indian legal experience to whose salary India contributes, not more than seven judges or ex-judges of the superior courts of the Dominions or colonies who are Privy Councillors and not more than two judges or ex-judges of a High Court of British India who are Privy Councillors.*

The Judicial Committee of the British Privy Council is one of the most important links of the Commonwealth. It is a tribunal to which cases are brought in appeal from different colonies, from India and from most of the Dominions. It may be regarded, therefore, as a factor which binds together the different members of this Commonwealth of Nations. There was a time when its jurisdiction in every part of the British Empire except the British Isles was accepted without murmur and was in fact regarded as a privilege to be cherished. But since 1900 it has been challenged and resisted. The voice of opposition was first heard in Australia. When the different colonies in this continent were planning for a federation and a bill to that effect was framed, the Australians refused to make any provision therein for the jurisdiction of the Judicial Committee of

* Wade and Phillips, *Constitutional Law* (2nd Ed., 1936), pp. 462-67.

the Privy Council in cases which might arise of their constitution. They provided for a High Court in their own country in which was vested the guardianship of the constitution. All constitutional disputes were to be settled according to the decision of this tribunal. This provision of course became slightly modified when the bill became the Commonwealth of Australia Act. It was laid down that in those constitutional cases alone in which the High Court of Australia would give leave, appeals might be made to the Judicial Committee of the Privy Council.* In other than constitutional cases however appeals might be entertained by this Committee without such leave.

For over two decades the opposition to the Privy Council's unqualified jurisdiction remained confined to Australia. Other parts of the Empire still valued this jurisdiction and placed implicit confidence in the soundness and impartiality of the decisions of the Judicial Committee. When however southern Ireland was given the status of a Dominion, it became ill at ease with the jurisdiction exercised by this body within its limits. The Irish Free State was wedded to the principle of complete national autonomy, and it was of opinion that the jurisdiction of the British Privy Council would be inconsistent with this autonomy. It was regarded as an extra-territorial tribunal and the authority which it would

* See the speech of Joseph Chamberlain in introducing the Commonwealth Bill in House of Commons on May 14, 1900. See Keith, *Speeches and Documents on Colonial Policy*, Vol. I, p. 381.

exercise must be therefore in conflict with the principle of national freedom which every Dominion was to enjoy. So in 1933 the Judicial Committee of the British Privy Council was deprived of all jurisdiction over the Irish Free State, and the Irish Supreme Court became the highest tribunal in this country.* The Privy Council has thus absolutely lost ground in one part of the Commonwealth. But in the Dominion of Canada and other parts of the Empire it is still a valued institution. In Canada, criminal appeals to this body have of late been abolished no doubt,† but otherwise its jurisdiction is still unquestioned. The province of Quebec is especially an ardent champion of its authority. This province is Roman Catholic in religion and mostly French in population and regards this tribunal as the protector of its privileges and rights. The Dominion Supreme Court might be influenced by the predominantly Protestant and English atmosphere of the country and might do injustice to the cause of Quebec. But the Empire Tribunal situated in London and disinterested in the local disputes and jealousies was expected always to be an impartial and independent bulwark. This attitude of Quebec is mainly responsible for the attachment of Canada to the Judicial Committee of the Privy Council.

In India up till now the appeals heard by the Judicial Committee of the Privy Council were all brought from the High Courts of the different provinces. Under the Government of India Act, 1935,

* Wade and Phillips, pp. 462-67.

† In 1933. *Ibid.*

however, a Federal Court is being established. This Court will be concerned, as we shall soon see, only with cases arising out of the interpretation of the constitution. Of course if the Federal Legislature so desires, it may confer upon this tribunal the right to hear appeals in some civil cases as well. But it is expected that the Federal Court will be mainly, if not exclusively, a court for settling constitutional disputes. It is from this court therefore that in the future the constitutional cases will be carried in appeal to the Judicial Committee of the Privy Council. Other appeals preferred in this tribunal will be as before from the decisions of the High Courts. The Committee has the right to hear both criminal and civil appeals. But in criminal cases nowadays appeals are not usually admitted by this body. The decisions of the High Courts have to be taken as final in such cases. In civil matters, however, cases which involve important law points or involve disputes in respect of considerable property are admitted in appeal to the Judicial Committee of the Privy Council. Now and again stray voices are heard no doubt against the existing connection of India with the Judicial Committee of the British Privy Council being indefinitely maintained. It is regarded as inconsistent with national autonomy towards which this country is so fast progressing. It is also regarded as too ruinously expensive for the litigant public. But the general consensus of Indian opinion seems to be in favour of maintaining the jurisdiction of the Privy Council. The efficiency, impartiality and independence of the Judicial Committee make this body an asset to India.

Next in status to this tribunal will be the Federal Court which will be located in Delhi. It will consist of a Chief Justice and not more than six puisne judges.* If an address is presented by both houses of the federal legislature for the increase of the number then only more than six such judges may be appointed. So the maximum number of judges in the federal court is likely to be seven for at least a few years. Every judge including the Chief Justice will be appointed by His Majesty or in other words by the Secretary of State and will continue in office till he completes the sixty-fifth year of his life.† Judges will be recruited from among those who have served as judges of High Courts for at least five years or who have been barristers of England or members of the Faculty of Advocates in Scotland for at least ten years or who have been for at least ten years pleaders of a High Court in British India or in a Federated State. The Judges who will be recruited from among the judges of the High Courts may have been originally either members of the Indian Civil Service or practising lawyers. But the Chief Justice of the Federal Court must be recruited only from among those persons who have practised as barristers, advocates or pleaders of High Courts for at least fifteen years or from among those judges of the High Courts who have been chosen as such from among the qualified practising lawyers. In other words, the members of the judicial branch of the Indian Civil Service will be ineligible for

* Sec. 200 (1).
† Sec. 200 (2).

appointment as the Chief Justice of the Federal Court.* The arrangement would have been more satisfactory if the principle accepted in respect of the appointment of the Chief Justice were extended further and applied to the appointment of all the puisne judges as well. The connection of the Indian Civil Service with the judiciary and especially with the higher judiciary has not been as healthy and salutary as it is sometimes given out to be. In case of the higher judiciary it has, on the contrary, definitely made for inefficiency. The civilian judges are not usually credited with those two virtues which should always adorn a judicial tribunal. They are not known to possess to the requisite degree either legal knowledge and acumen or steady independence. It would have enhanced the reputation of the guardian of the Indian Constitution if this court always consisted of judges recruited exclusively from the luminaries of the bar.

The Federal Court will have original jurisdiction in all constitutional disputes between one province and another, between a province and a federated state and between a province and the federal authorities.† So the balance of power instituted by the federal constitution will be maintained, as it was created, by the decisions of this court. In case the sphere of one authority is encroached upon by another, the former will have the right to institute a case in this tribunal and the latter after hearing the parties

* Sec. 200 (3).
† Sec. 204.

concerned will issue its judgment. Besides entertaining these original suits, the Federal Court will also hear appeals from the judgments, decrees or final orders of the High Courts if the latter certify that the cases involve a substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder.*

The High Courts were created in 1861. Until then there were two chief tribunals in a presidency town. These were the Sudder Court consisting of judges who were recruited exclusively from the officers of the Company and the Supreme Court to which judges were appointed by Her Majesty from among the barristers of England or members of the Faculty of Advocates in Scotland. The High Court established in 1861 was practically the amalgam of these two institutions. In composition at least it partook of the character both of the Company's Sudder Court and Her Majesty's Supreme Court. It was laid down that at least one-third of the judges of the High Courts must be recruited from Her Majesty's Civil Service in India, another one-third at least must be recruited from among barristers of England or advocates of Scotland and the remaining portion might be appointed from among the pleaders of the High Courts or the members of the subordinate judiciary. The Chief Justices of the High Courts however must be recruited only from among the barristers of England or advocates of Scotland. Permanent appointments to the office of the Chief Justice were

* Sec. 205.

not to be made either from the Indian Civil Service or from among the pleaders of the High Courts.

This arrangement has continued ever since. It has been found by experience that the civilian judges have not been up to the responsibility which awaits them in the High Courts. As District and Sessions Judges even they are not often very successful. But if somehow they may discharge their duties in this capacity, they frequently find themselves unequal to their duties when they are promoted to the High Courts. It has therefore been the demand of the Indian public for several decades that the Civilians should cease to be recruited for the bench. But the Government of India Act, 1935, instead of complying with this demand of the Indian public has provided for an arrangement that can be characterised only as retrogade.* In the first place the old proportional arrangement has been abolished. Judgeships of the High Court will no longer be proportionally earmarked for barristers, for members of the Indian Civil Service and for pleaders of High Courts. The judges will be recruited as convenience dictated from these three categories but not necessarily in the old proportion. It is apprehended that this arrangement will be of greater advantage to the Indian Civil Service than the former one. Secondly, the Chief Justice will no longer be recruited exclusively from among the practising barristers or advocates of Scotland. He may also be appointed in the future either from among

* Section 220.

the pleaders of High Courts or from among the members of the Indian Civil Service. In the latter case of course before elevation to the office of the Chief Justice the candidate must have acted as a puisne judge of a High Court for at least three years. Thus instead of the civilian element being eliminated from the High Court bench, as the Indian public demanded, it has been strengthened by the provisions of the Government of India Act, 1935.

Below the High Courts are the courts of the District and Sessions Judges. The same person presides over these two courts of a district. As District Judge, he is the head of the civil judiciary of the district and as Sessions Judge he constitutes the highest criminal court in that area. Both on the civil and on the criminal side he has usually several colleagues and assistants. There are several Sub-Judges, one or two Additional District and Sessions Judges and one or two Assistant Sessions Judges. The Sub-Judges try most of the civil cases that are instituted in the court of the District Judge. The Assistant Sessions Judges, on the other hand, take up many of the sessions cases. The Additional District and Sessions Judges like the District and Sessions Judges dispense justice both in the civil and criminal spheres.

The District and Sessions Judges are recruited mostly from the Indian Civil Service. A portion of them only is selected by promotion from the Sub-Judges who are members of the judicial branch of the Provincial Civil Service. A few also are

recruited directly from among practising lawyers.* But as pointed out already the greater portion of the District Judges is supplied by the Indian Civil Service. This Service is divided into two branches. After twelve years of service every member of this body has to decide as to which one of the two he will select for himself. He may be inclined towards executive work and may accordingly choose the executive branch. He may again dislike the rough and tumble of the executive line and may prefer the graver and more sombre work of a judge. He may accordingly decide in favour of the judicial branch. Of course it does not absolutely depend upon the member himself as to the line in which he may be required to work. The Government after consulting his service file may not grant exactly his desire and may want him to choose a branch which he would not have chosen for himself. This bi-furcation of the Civil Service was brought about in 1872. Before that, members of the Civil Service had to move like a shuttlecock between executive and judicial offices, and as they could not acquire continuous judicial experience they failed to do full justice to their duties when they were called upon to fill a judicial office. Nowadays after twelve years of service, the Civilians have usually one kind of work to perform. In spite of this reform, the

* When the Islington Commission on Public Services (1912-1915) took evidences in this country, most of the Indian witnesses who appeared before it demanded the recruitment of Judges from the bar, and the discontinuance of the practice of recruiting them from the I.C.S. The Commission only recommended that 40 of the District and Sessions Judges should be recruited directly from the bar.—Report, p. 169.

Civilians feel considerably handicapped when they are called upon to fill a high judicial office. Their knowledge of law is usually perfunctory. A Civilian has never been, as Sir Abdur Rahim observed in his minute of dissent in the Islington Commission Report, " behind the scenes, never drafted a plaint or a written statement nor examined or cross-examined a witness in his life. . ." He must be, therefore, " at a considerable disadvantage in arriving at the true and important facts of a case." In fact, " civilian " justice has become a by-word among the members of the bar. It is time that the practice of recruiting judges from the Civil Service is abandoned outright.*

Below the courts of the District and Sessions Judges are the lower civil courts presided over by the Munsifs and the lower criminal courts presided over by the Magistrates. In every sub-divisional head-quarters and not unoften in important villages Munsifs' courts have been set up to try petty civil cases. The Munsifs are recruited from distinguished law graduates of the province. Formerly it was insisted upon that such a graduate must have three years' experience at the bar. Nowadays, however, this rule has been dropped and experience at the bar is not an essential qualification for the candidates. The change does not appear to be one for the better.

The Magistrates, except the Honorary Magistrates, are either members of the executive branch of the Provincial Civil Service, or belong to the Indian Civil Service. They are divided into three

* For full discussion of the subject, see N. C. Roy, *Indian Civil Service*, pp. 132-80

classes. The first class Magistrates have the power to sentence an accused to two years' hard labour and a fine of Rs. 1,000. The Magistrates are all controlled by the District Magistrate. He inspects their courts, looks over their files, and controls to a great extent their promotion. He may transfer a case from the court of one Magistrate to that of another. He is also to hear appeals from the decisions of the second and third class Magistrates. Now the District Magistrate is not concerned with judicial duties alone. His chief functions are, in fact, executive in kind and character. He is the representative of the Government in his district and is responsible for maintaining the law and order in this area. He supervises and controls the police in the detection of crime, the investigation of cases and the apprehension of criminals. He is, therefore, *par excellence* an executive officer. His bias is pre-eminently executive and consequently when he either himself tries a case or supervises the work of another trying Magistrate, his views are apt to be coloured by executive exigencies. The combination of the functions of the chief constable and the judge, the thief-catcher and the thief-trier in the hands of the same officers has in fact made impartial justice difficult to obtain in many cases in the lower criminal courts. Complete separation of judicial functions from executive duties has therefore been the demand of the Indian people for about a century. The reform is in fact long overdue.*

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* For full discussion of the subject, see N. C. Roy, *A Monograph on the Separation of Executive and Judicial Powers in British India* (1931, M. C. Sarkar and Sons, Calcutta), pp. 61-90.

Appendix I

TABLE OF SEATS

THE FEDERAL ASSEMBLY

Representatives of British India

Province	Total seats	Total of General seats	General seats reserved for scheduled castes	Sikh seats	Muhammadan seats	Anglo-Indian seats	European seats	Indian Christian seats	Seats for re-presentaives of commerce and industry	Landholders' seats	Seats for re-presentatives of labour	Women's seats
1	2	3	4	5	6	7	8	9	10	11	12	13
Madras ..	37	19	4	—	8	1	1	2	2	1	1	2
Bombay ...	30	13	2	—	6	1	1	1	3	1	2	2
Bengal ..	37	10	3	—	17	1	1	1	3	1	2	1
United Provinces	37	19	3	—	12	1	1	1	—	1	1	1
Punjab ...	30	6	1	6	14	—	1	1	—	1	—	1
Bihar ...	30	16	2	—	9	—	1	1	—	1	1	1
Central Provinces and Berar ...	15	9	2	—	3	—	—	—	—	1	1	1
Assam ...	10	4	1	—	3	—	1	1	—	—	1	—
North-West Frontier Province ...	5	1	—	—	4	—	—	—	—	—	—	—
Orissa ...	5	4	1	—	1	—	—	—	—	—	—	—
Sind ...	5	1	—	—	3	—	1	—	—	—	—	—
British Baluchistan ...	1	—	—	—	1	—	—	—	—	—	—	—
Delhi ...	2	1	—	—	1	—	—	—	—	—	—	—
Ajmer-Merwara ...	1	1	—	—	—	—	—	—	—	—	—	—
Coorg ...	1	1	—	—	—	—	—	—	—	—	—	—
Non-Provincial seats ...	4	—	—	—	—	—	—	—	3	—	1	—
Total ...	250	105	19	6	82	4	8	8	11	7	10	9

Appendix II

TABLE OF SEATS

THE COUNCIL OF STATE

Representatives of British India

Province or Community	Total Seats	General Seats	Seats for Scheduled Castes	Sikh Seats	Muhammadan Seats	Women's Seats
1	2	4	3	4	6	7
Madras	20	14	1	—	4	1
Bombay	16	10	1	—	4	1
Bengal	20	8	1	—	10	1
United Provinces	20	11	1	—	7	1
Punjab	16	3	—	4	8	1
Bihar	16	10	1	—	4	1
Central Provinces and Berar	8	6	1	—	1	—
Assam	5	3	—	—	2	—
North-West Frontier Province	5	1	—	—	4	—
Orissa	5	4	—	—	1	—
Sind	5	2	—	—	3	—
British Baluchistan	1	—	—	—	1	—
Delhi	1	1	—	—	—	—
Ajmer-Merwara	1	1	—	—	—	—
Coorg	1	1	—	—	—	—
Anglo-Indians	1	—	—	—	—	—
Europeans	7	—	—	—	—	—
Indian-Christians	2	—	-	—	—	—
Total ...	150	75	6	4	49	6

Appendix III

TABLE OF SEATS

Provincial Legislative Assemblies

Province	Total Seats	General Seats: Total of General Seats	General Seats: General Seats reserved for Scheduled Castes	Seats for representatives of backward areas and tribes	Sikh Seats	Mahomedan Seats	Anglo-Indian Seats	European Seats	Indian Christian Seats	Seats for representatives of commerce, industry, mining and planting	Landholders' Seats	University Seats	Seats for representatives of labour	Seats for Women: General	Seats for Women: Sikh	Seats for Women: Mahomedan	Seats for Women: Anglo-Indian	Seats for Women: Indian Christian
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
Madras	215	146	30	1	—	28	2	2	8	6	6	1	6	6	—	1	—	1
Bombay	175	114	15	1	—	29	2	3	3	7	2	1	7	5	—	1	—	—
Bengal	250	78	30	—	—	117	3	11	2	19	5	2	8	2	—	2	1	—
United Provinces ...	228	140	20	—	—	64	1	2	2	3	6	1	3	4	—	2	—	—
Punjab	175	42	8	—	31	84	1	1	2	1	5	1	3	1	1	2	—	—
Bihar	152	86	15	7	—	39	1	2	1	4	4	1	3	3	—	1	—	—
Central Provinces and Berar	112	84	20	1	—	14	1	1	—	2	3	1	2	3	—	—	—	—
Assam	108	47	7	9	—	34	—	1	1	11	—	—	4	1	—	—	—	—
North-West Frontier Province	50	9	—	—	3	36	—	—	—	—	2	—	—	—	—	—	—	—
Orissa	60	44	6	5	—	4	—	—	1	1	2	—	1	2	—	—	—	—
Sind	60	18	—	—	—	33	—	2	—	2	2	—	1	1	—	1	—	—

In Bombay seven of the general seats shall be reserved for Marathas.
In the Punjab one of the Landholders' seats shall be a seat to be filled by a Tumandar.
In Assam the seat reserved for women shall be a non-communal seat.

Appendix IV

TABLE OF SEATS

Provincial Legislative Councils

Province	Total of Seats	General Seats	Mahommedan Seats	European Seats	Indian Christian Seats	Seats to be filled by Legislative Assembly	Seats to be filled by Governor
1	2	3	4	5	6	7	8
Madras ...	Not less than 54 Not more than 56	35	7	1	3	—	Not less than 8 Not more than 10
Bombay ...	Not less than 29 Not more than 30	20	5	1	—	—	Not less than 3 Not more than 4
Bengal ...	Not less than 63 Not more than 65	10	17	3	—	27	Not less than 6 Not more than 8
United Provinces ...	Not less than 58 Not more than 60	34	17	1	—	—	Not less than 6 Not more than 8
Bihar ...	Not less than 29 Not more than 30	9	4	1	—	12	Not less than 3 Not more than 4
Assam ...	Not less than 21 Not more than 22	10	6	2	—	—	Not less than 3 Not more than 4

Appendix V

INSTRUMENT OF INSTRUCTIONS TO THE GOVERNOR-GENERAL

Whereas by Letters Patent bearing even date We have made effectual and permanent provision for the Office of Governor-General of India :

And Whereas by those Letters Patent and by the Act of Parliament passed on and entitled the Government of India Act, 1935 (hereinafter called " the said Act "), certain powers, functions and authority for the government of India and of Our Federation of India are declared to be vested in the Governor-General as Our Representative :

And Whereas, without prejudice to the provision in the said Act that in certain regards therein specified the Governor-General shall act according to instructions received from time to time from Our Secretary of State, and to the duty of Our Governor-General to give effect to any instructions so received, We are minded to make general provision regarding the manner in which Our said Governor-General shall execute all things which, according to the said Act and said Letters Patent, belong to his Office and to the trust which We have reposed in him :

And Whereas by the said Act it is provided that the draft of any such Instructions to be issued to Our Governor-General shall be laid by Our Secretary of State before both Houses of Parliament :

And Whereas both Houses of Parliament, having considered the draft laid before them according-

ly, have presented to Us an Address praying that Instructions may be issued to Our Governor-General in the form which hereinafter follows :

Now therefore We do by these Our Instructions under Our Sign Manual and Signet declare Our pleasure to be as follows :—

A.—Introductory.

I. Under these Our Instructions, unless the context otherwise require, the term "Governor-General" shall include every person for the time being administering the Office of Governor-General according to the provisions of Our Letters Patent constituting the said Office.

II. Our Governor-General for the time being shall, with all due solemnity, cause Our Commission under Our Sign Manual, appointing him, to be read and published in the presence of the Chief Justice of India for the time being, or, in his absence, other Judge of the Federal Court.

III. Our said Governor-General shall take the oath of allegiance and the oath for the due execution of the Office of Our Governor-General of India, and for the due and impartial administration of justice, in the form hereto appended, which oaths the Chief Justice of India for the time being, or in his absence any Judge of the Federal Court, shall, and is hereby required to, tender and administer unto him.

IV. And We do authorise and require Our Governor-General, by himself or by any other per-

son to be authorised by him in that behalf, to administer to every person appointed by him to hold office as a member of the Council of Ministers the oaths of office and of secrecy hereto appended.

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. And whereas great prejudice may happen to Our service and to the security of India by the absence of Our Governor-General, he shall not quit India during his term of office without having first obtained leave from Us under Our Sign Manual or through one of Our Principal Secretaries of State.

B.—In regard to the Executive Authority of the Federation.

VII. Our Governor-General shall do all that in him lies to maintain standards of good administration; to encourage religious toleration, co-operation and goodwill among all classes and creeds; and to promote all measures making for moral, social and economic welfare.

VIII. In making appointments to his Council of Ministers Our Governor-General shall use his best endeavours to select his Ministers in the following manner, that is to say, in consultation with the person who, in his judgment, is most likely to command a stable majority in the Legislature, to appoint those persons (including so far as practicable representatives of the Federated States and members of important minority communities) who will best

be in a position collectively to command the confidence of the Legislature. But, in so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers.

IX. In all matters within the scope of the executive authority of the Federation, save in respect of those functions which he is required by the said Act to exercise in his discretion, Our Governor-General shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the said Act committed to him, or with the proper discharge of any of the functions which he is otherwise by the said Act required to exercise on his individual judgment; in any of which cases Our Governor-General shall, notwithstanding his Ministers' advice, act in exercise of the powers by the said Act conferred upon him in such manner as to his individual judgment seems requisite for the due discharge of the responsibilities and functions aforesaid. But he shall be studious so to exercise his powers as not to enable his Ministers to rely upon his special responsibilities in order to relieve themselves of responsibilities which are properly their own.

X. It is Our will and pleasure that in the discharge of his special responsibility for safeguarding the financial stability and credit of the Federation Our Governor-General shall in particular make it his duty to see that a budgetary or borrowing policy is not pursued which would, in his judgment, seriously prejudice the credit of India in the money

markets of the world; or affect the capacity of the Federation duly to discharge its financial obligations.

XI. Our Governor-General shall interpret his special responsibility for the safeguarding of the legitimate interests of minorities as requiring him to secure, in general, that those racial or religious communities for the members of which special representation is accorded in the Federal Legislature, and those classes who, whether on account of the smallness of their number or their lack of educational or material advantages or from any other cause, cannot as yet fully rely for their welfare on joint political action in the Federal Legislature, shall not suffer, or have reasonable cause to fear, neglect or oppression. But he shall not regard as entitled to his protection any body of persons by reason only that they share a view on a particular question which has not found favour with the majority.

Further, Our Governor-General shall interpret the said special responsibility as requiring him to secure a due proportion of appointments in Our Services to the several communities, and he shall be guided in this regard by the accepted policy prevailing before the issue of these Our Instructions, unless he is fully satisfied that modification of that policy is essential in the inerests of the communities affected or of the welfare of the public.

XII. In the discharge of his special responsibility for the securing to members of the public services of any rights provided for them by or under the said Act and the safeguarding of their legiti-

mate interests Our Governor-General shall be careful to safeguard the members of Our Services not only in any rights provided for them by or under the said Act or any other law for the time being in force, but also against any action which, in his judgment, would be inequitable.

XIII. The special responsibility of Our Governor-General for securing in the sphere of executive action any of the purposes which the provisions of Chapter III of Part V of the said Act are designed to secure in relation to legislation shall be construed by him as requiring him to differ from his Ministers if in his individual judgment their advice would have effects of the kind which it is the purpose of the said chapter to prevent, even though the advice so tendered to him is not in conflict with any specific provision of the said Act.

XIV. In the discharge of his special responsibility for the prevention of measures which would subject goods of United Kingdom origin imported into India to discriminatory or penal treatment, Our Governor-General shall avoid action which would affect the competence of his Government and of the Federal Legislature to develop their own fiscal and economic policy, or would restrict their freedom to negotiate trade agreements whether with the United Kingdom or with other countries for the securing of mutual tariff concessions; and he should intervene in tariff policy or in the negotiation of tariff agreements only if in his opinion the main intention of the policy contemplated is by trade restrictions to injure the interests of the United Kingdom rather than to further the economic

interests of India. And We require and charge him to regard the discriminatory or penal treatment covered by this special responsibility as including both direct discrimination (whether by means of differential tariff rates or by means of differential restrictions on imports) and indirect discrimination by means of differential treatment of various types of products: and Our Governor-General's special responsibility extends to preventing the imposition of prohibitory tariffs or restrictions, if he is satisfied that such measures are proposed with the aforesaid intention. It also extends, subject to the aforesaid intention, to measures which, though not discriminatory or penal in form would be so in fact.

At the same time in interpreting the special responsibility to which this paragraph relates, our Governor-General shall bear always in mind the partnership between India and the United Kingdom within Our Empire, which has so long subsisted, and the mutual obligations which arise therefrom.

XV. Our Governor-General shall construe his special responsibility for the protection of the rights of any Indian State as requiring him to see that no action shall be taken by his Ministers, and no Bill of Federal Legislature shall become law, which would imperil the economic life of any State, or affect prejudicially any right of any State heretofore or hereafter recognised,* whether derived

* The procedure for the determination of the right in case of a dispute rests with the Crown's representative for the conduct of relations with the States.

from treaty, grant, usage, sufferance or otherwise, not being a right appertaining to a matter in respect to which, in virtue of the Ruler's Instrument of Accession, the Federal Legislature may make laws for his State and his subjects.

XVI. In the framing of rules for the regulation of the business of the Federal Government Our Governor-General shall ensure that, amongst other provisions for the effective discharge of that business, due provision is made that the Minister in charge of the Finance Department shall be consulted upon any proposal by any other Minister which affects the finances of the Federation: and further that no reappropriation within a Grant shall be made by any Minister otherwise than after consultation with the Finance Minister; and that in any case in which the Finance Minister does not concur in any such proposal, the matter shall be brought for decision before the Council of Ministers.

XVII. Although it is provided in the said Act that the Governor-General shall exercise his functions in part in his discretion and in part with the aid and advice of Ministers, nevertheless it is Our will and pleasure that Our Governor-General shall encourage the practice of joint consultation between himself, his Counsellors and his Ministers. And seeing that the Defence of India must to an increasing extent be the concern of the Indian people it is Our will in especial that Our Governor-General should have regard to this instruction in his administration of the Department of Defence; and notably that he shall bear in mind desirability of ascertaining the views of his Ministers when he

shall have occasion to consider matters relating to the general policy of appointing Indian Officers to Our Indian Forces, or the employment of Our Indian Forces on Service outside India.

XVIII. Further it is Our will and pleasure that in the administration of the Department of Defence Our Governor-General shall obtain the views of Our Commander-in-Chief in any matter which will affect the discharge of latter's duties and shall transmit his opinion to Our Secretary of State whenever the Commander-in-Chief may so request on any occasion when Our Governor-General communicates with Our Secretary of State upon them.

XIX. And We desire that, although the financial control of Defence administration must be exercised by the Governor-General at his discretion, nevertheless the Federal Department of Finance shall be kept in close touch with this control by such arrangement as may prove feasible, and that the Federal Ministry and, in particular, the Finance Minister shall be brought into consultation before estimates of proposed expenditure for the service of Defence are settled and laid before the Federal Legislature.

C.—In regard to Relations between the Federation, Provinces and Federated States.

XX. Whereas it is expedient, for the common good of Provinces and Federated States alike, that the authority of the Federal Government and Legislature in those matters which are by law assigned to them should prevail :

And whereas at the same time it is the purpose of the said Act that on the one hand the Governments and Legislatures of the Provinces should be free in their own sphere to pursue their own policies, and on the other hand that the sovereignty of the Federated States should remain unaffected save in so far as the Rulers thereof have otherwise agreed by their Instruments of Accession :

And whereas in the interest of the harmonious co-operation of the several members of the body politic the said Act has empowered Our Governor-General to exercise at his discretion certain powers affecting the relations between the Federation and Provinces and States :

It is Our will and pleasure that Our Governor-General, in the exercise of these powers, should give unbiased consideration as well to the views of the Governments of Provinces and Federated States as to those of his own Ministers, whenever those views are in conflict and, in particular, when it falls to him to exercise his power to issue orders to the Governor of a Province, or directions to the Ruler of a Federated State, for the purpose of securing that the executive authority of the Federation is not impeded or prejudiced, or his power to determine whether provincial law or federal law shall ragulate a matter in the sphere in which both Legislatures have power to make laws.

XXI. It is Our desire that Our Governor-General shall by all reasonable means encourage consultation with a view to common action between the Federation, Provinces and Federated States. It is further Our will and pleasure that Our Gover-

nor-General shall endeavour to secure the co-operation, of the Governments of Provinces and Federated States in the maintenance of such federal agencies and institutions for research as may serve to assist the conduct by Provincial Governments and Federated States of their own affairs.

XXII. In particular We require our Governor-General to ascertain by the method which appears to him best suited to the circumstances of each case the views of Provinces and of Federated States upon any legislative proposals which it is proposed to introduce in the Federal Legislature for the imposition of taxes in which Provinces or Federated States are interested.

XXIII. Before granting his previous sanction to the introduction of a Bill into the Federal Legislature imposing a Federal surcharge on taxes on income, Our Governor-General shall satisfy himself that the results of all practicable economies and of all practicable measures for increasing the yield accruing to the Federation from other sources of taxation within the powers of the Federal Legislature would be inadequate to balance Federal receipts and expenditure on revenue account; and among the aforesaid measures shall be included the exercise of any powers vested in him in relation to the amount of the sum retained by the Federation out of money, assigned to the Provinces from taxes on income.

XXIV. Our Governor-General, in determining whether the Federation would or would not be justified in refusing to make a loan to a Province, or to give a guarantee in respect of a loan to be

raised by a Province, or in imposing any conditions in relation to such loan or guarantee, shall be guided by the general policy of the Federation for the time being as to the extent to which it is desirable that borrowings on behalf of the Provinces should be undertaken by the Federation; but such general policy shall not in any event be deemed to prevail against the grant by the Federation of a loan to a Province or a guarantee in respect of a loan to be raised by that Province, if in the opinion of Our Governor-General a temporary financial emergency of a grave character has arisen in a Province, in which refusal by the Federation of such a grant or guarantee would leave the Province with no satisfactory means of meeting such temporary emergency.

XXV. Before granting his previous sanction to the introduction into the Federal Legislature of any Bill or amendment wherein it is proposed to authorise the Federal Government to give directions to a Province as to the carrying into execution in that Province of any Act of the Federal Legislature relating to a matter specified in Part II of the Concurrent Legislative List appended to the said Act, it is Our will and pleasure that Our Governor-General should take care to see that the Governments of the Provinces which would be affected by any such measure have been duly consulted upon the proposal, and upon any other proposals which may be contained in any such measure for the imposition of expenditure upon the revenues of the Provinces.

XXVI. In considering whether he shall give

his assent to any Provincial law relating to a matter enumerated in the Concurrent Legislative List, which has been reserved for his consideration on the ground that it contains provisions repugnant to the provisions of a Federal law, Our Governor-General, while giving full consideration to the proposals of the Provincial Legislature, shall have due regard to the importance of preserving substantially the broad principles of those codes of law through which uniformity of legislation has hitherto been secured.

D.—Matters affecting the Legislature.

XXVII. Our Governor-General shall not assent in Our name to, but shall reserve for the signification of Our pleasure, any Bill of any of the classes herein specified, that is to say:—

(*a*) any Bill the provisions of which would repeal or be repugnant to provisions of any Act of Parliament extending to British India;

(*b*) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court of any Province as to endanger the position which these Courts are by the said Act designed to fill;

(*c*) any Bill passed by a Provincial Legislature and reserved for his consideration which would alter the character of the Permanent Settlement;

(*d*) any Bill regarding which he feels doubt whether it does, or does not, offend against the purposes of Chapter III, Part V of the said Act.

XXVIII. It is further Our will and pleasure that if an Agreement is made with His Exalted Highness the Nizam of Hyderabad as contemplated in Part III of the said Act, Our Governor-General in notifying his assent in Our name to any Act of the Legislature of the Central Provinces and Berar which has been reserved for his consideration, shall declare that his assent to the Act in its application to Berar has been given on Our behalf and in virtue of the provisions of Part III of the said Act in pursuance of the Agreement between Us and His Exalted Highness the Nizam.

XXIX. It is Our will that the power vested by the said Act in Our Governor-General to stay proceedings upon a Bill, clause or amendment in the Federal Legislature in the discharge of his special responsibility for the prevention of grave menace to peace and tranquillity shall not be exercised unless, in his judgment, the public discussion of the Bill, clause or amendment would itself endanger peace and tranquillity.

XXX. It is Our will and pleasure that in choosing the representatives of British India for seats in the Council of State which are to be filled by Our Governor-General by nominations made in his discretion he shall so far as may be redress inequalities of representation which may have resulted from election. He shall in particular

bear in mind the necessity of securing representation for Scheduled Castes and women; and in any nominations made for the purpose of redressing inequalities in relation to minority communities (not being communities to whom seats are specifically allotted in the Table in the first Part of the first Schedule to the said Act) he shall so far as seems to him just be guided by the proportion of seats allotted to such minority communities among British India representatives of the Federal Assembly.

E.—General.

XXXI. And finally it is Our will and pleasure that our Governor-General should so exercise the trust which we have reposed in him that partnership between India and the United Kingdom within our Empire may be furthered, to the end that India may attain its due place among Our Dominions.

Appendix VI

INSTRUMENT OF INSTRUCTIONS TO THE GOVERNOR

Whereas by Letters Patent bearing even date We have made effectual and permanent provision for the Office of Governor of

And Whereas by those Letters Patent and by the Act of Parliament passed on and entitled the Government of India Act, 1935 (hereinafter called "the said Act"), certain powers, functions and authority for the government of the Province of are declared to be vested in the Governor as Our Representative :

And Whereas, without prejudice to the provision in the said Act that in certain regards therein specified the Governor shall act according to instructions received from time to time from Our Governor-General, and to the duty of Our Governor to give effect to instructions so received, We are minded to make general provision regarding the due manner in which Our said Governor shall execute all things which, according to the said Act and the said Letters Patent, belong to his Office, and to the trust which We have reposed in him :

And Whereas by the said Act it is provided that the draft of any such Instructions to be issued to a Governor shall be laid by Our Secretary of State before both Houses of Parliament :

And Whereas both Houses of Parliament, having considered the draft laid before them accor-

dingly, have presented to Us an Address praying that Instructions may be issued to Our Governor of in the form which hereinafter follows:

Now therefore We do by these Our Instructions under Our Sign Manual and Signet declare Our pleasure to be as follows:—

A.—Introductory.

I. Under these Our Instructions, unless the context otherwise require, the term "Governor" shall include every person for the time being administering the Office of Governor according to the provisions of Our Letters Patent constituting the said Office.

II. Our Governor for the time being shall, with all due solemnity, cause Our Commission under Our Sign Manual appointing him to be read and published in the presence of the Chief Justice for the time being, or, in his absence, other Judge, of the High Court of the Province.

III. Our said Governor shall take the oath of allegiance and the oath for the due execution of the Office of Our Governor of , and for the due and impartial administration of justice in the form hereto appended, which oaths the Chief Justice for the time being, or in his absence any Judge, of the High Court, shall, and he is hereby required to, tender and administer unto him.

IV. And We do authorise and require Our Governor, by himself or by any other person to be

authorised by him in that behalf, to administer to every person appointed by him to hold the office as member of the Council of Ministers, the oaths of office and of secrecy hereto appended

V. And We do further direct that every person who under these Instructions shall be required to take an oath may make an affirmation in place of an oath if he has any objection to making an oath.

VI. And whereas great prejudice may happen to Our service by the absence of Our Governor, he shall not quit India during his term of office without having first obtained leave from Us under Our Sign Manual or through one of Our Principal Secretaries of State.

B.—In regard to the Executive Authority of the Province.

VII. Our Governor shall do all that in him lies to maintain standards of good administration; to encourage religious toleration, co-operation and goodwill among all classes and creeds; and to promote all measures making for moral, social and economic welfare, and tending to fit all classes of the population to take their due share in the public life and government of the Province.

VIII. In making appointments to his Council of Ministers Our Governor shall use his best endeavours to select his Ministers in the following manner, that is to say, in consultation with the person who in his judgment is likely to command

a stable majority in the Legislature to appoint those persons (including so far as practicable members of important minority communities) who will best be in a position collectively to command the confidence of the Legislature. But, in so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers.

IX. In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by the said Act to exercise in his discretion, Our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the said Act committed to him, or with the proper discharge of any of the functions which he is otherwise by the said Act required to exercise on his individual judgment; in any of which cases Our Governor shall, notwithstanding his Ministers' advice, act in exercise of the powers by the said Act conferred upon him in such manner as to his individual judgment seems requisite for the due discharge of the responsibilities and functions aforesaid. But he shall be studious so to exercise his powers as not to enable his Ministers to rely upon his special responsibilities in order to relieve themselves of responsibilities which are properly their own.

X. Our Governor shall interpret his special responsibility for the safeguarding of the legitimate interests of the minorities as requiring him to

secure, in general, that those racial or religious communities for the members of which special representation is accorded in the Legislature, and those classes of the people committed to his charge who, whether on account of the smallness of their number or their lack of educational or material advantages or from any other cause, cannot as yet fully rely for their welfare upon joint political action in the Legislature, shall not suffer, or have reasonable cause to fear, neglect or oppression. But he shall not regard as entitled to his protection any body of persons by reason only that they share a view on a particular question which has not found favour with the majority.

Further, Our Governor shall interpret the said special responsibility as requiring him to secure a due proportion of appointments in Our Services to the several communities, and so far as there may be in his Province at the date of issue of these Our Instructions an accepted policy in this regard, he shall be guided thereby, unless he is fully satisfied that modification of that policy is essential in the interests of the communities affected or of the welfare of the public.

XI. In the discharge of his special responsibility for the securing to members of the public services of any rights provided for them by or under the said Act and the safeguarding of their legitimate interests Our Governor shall be careful to safeguard the members of Our Services not only in any rights provided for them by or under the said Act or any other law for the time being in

force, but also against any action which, in his judgment, would be inequitable.

XII. The special responsibility of Our Governor for securing in the sphere of executive action any of the purposes which the provisions of Chapter III of Part V of the said Act are designed to secure in relation to legislation shall be construed by him as requiring him to differ from his Ministers if in his individual judgment their advice would have effects of the kind which it is the purpose of the said Chapter to prevent, even though the advice so tendered to him is not in conflict with any specific provision of the said Act.

XIII. Our Governor shall construe his special responsibility for the protection of the rights of any Indian State as requiring him to see that no action shall be taken by his Ministers, and no Bill of the Provincial Legislature shall become law, which would imperil the economic life of any State, or affect prejudicially any right of any State heretofore or hereafter recognised,* whether derived from treaty, grant, usage, sufferance or otherwise, not being a right appertaining to a matter with respect to which, in virtue of the Ruler's Instrument of Accession, the Federal Legislature may make laws for his State and his subjects: and he shall refer to Our Governor-General any questions which may arise as to the existence of any such right.

* The procedure for the determination of the right in case of a dispute rests with the Crown's representative for the conduct of relation with the States.

*XIV. If an Agreement is made with His Exalted Highness the Nizam of Hyderabad as contemplated in Part III of the said Act, Our Governor shall interpret his special responsibility for the safeguarding of the rights of any Indian State as also requiring him in the administration of Berar to have due regard to the commercial and economic interests of the State of Hyderabad.

Further, if Our Governor is at any time of opinion that the policy hitherto in force affords to him no satisfactory guidance in the interpretation of his special responsibility for securing that a reasonable share of the revenues of his Province is expended in or for the benefit of Berar he shall, if he deems it expedient, fortify himself with advice from a body of experienced and unbiased persons whom he may appoint for the purpose of recommending what changes in policy would be suitable and equitable.

XV. In the framing of rules for the regulation of the business of the Provincial Government Our Governor shall ensure that, amongst other provisions for the effective discharge of that business, due provision is made that the Minister in charge of the Finance Department shall be consulted upon any proposal by any other Minister which affects the finances of the Province: and further that no reappropriation within a Grant shall be made by any Department otherwise than after consultation with the Finance Minister; and that in any case in

* This paragraph will be included in the Instrument of Instructions to the Governor of the Central Provinces and Berar only.

which the Finance Minister does not concur in any such proposal the matter shall be brought for decision before the Council of Ministers.

XVI. Having regard to the powers conferred by the said Act upon Our Secretary of State to appoint persons to Our service if, in his opinion, circumstances arise which render it necessary for him so to do in order to secure efficiency in irrigation, Our Governor shall make it his care to see that he is kept constantly supplied with information as to the conduct of irrigation in his Province in order that he may, if need be, place this information at the disposal of Our Governor-General.

* XVII. Our Governor shall bear constantly in mind the danger to India as a whole of any failure to maintain peace and security on the North-West Frontier. He shall, therefore, in the exercise of the executive authority of the Province, constantly have regard to the due discharge of his functions as Agent to Our Governor-General in respect of the tribal areas situate between the frontiers of India and the North-West Frontier Province; and he shall not hesitate to exercise his special responsibility for securing that the due discharge of his functions in respect of such tribal areas is not prejudiced or impeded by any course of action taken with respect to any other matter.

C.—Matters affecting the Legislature.

XVIII. Our Governor shall not assent in Our name to, but shall reserve for the consideration of

* This paragraph will be included in the Instructions to the Governor of the North-West Frontier Province only.

Our Governor-General, any Bill of any of the classes herein specified, that is to say :—

(*a*) any Bill the provisions of which would repeal or be repugnant to provisions of any Act of Parliament extending to British India;

(*b*) any Bill which in his opinion would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by the said Act designed to fill;

(*c*) any Bill which would alter the character of the Permanent Settlement;

(*d*) any Bill regarding which he feels doubt whether it does, or does not, offend against the purposes of Chapter III of Part V of the said Act.

*XIX. If an Agreement is made with His Exalted Highness the Nizam of Hyderabad as aforesaid Our Governor in notifying his assent in Our name to any enactment of the Provincial Legislature shall declare that his assent has been given in virtue of the provisions of Part III of the said Act and in pursuance of the agreement between Us and His Exalted Highness the Nizam.

XX. It is Our will that the power vested by the said Act in Our Governor to stay proceedings upon a Bill in the Provincial Legislature in the

* This paragraph will be included in the Instructions to the Governor of the Central Provinces and Berar only.

discharge of his special responsibility for the prevention of grave menace to peace and tranquillity shall not be exercised unless, in his judgment, the public discussion of the Bill would itself endanger peace and tranquillity.

XXI. It is Our will and pleasure that the seats in the Legislative Council to be filled by the nomination of Our Governor shall be so apportioned as in general to redress, so far as may be, inequalities of representation which may have resulted from election, and in particular to secure representation for women and the Scheduled Castes in that Chamber.

Appendix VII

DRAFT INSTRUMENT OF ACCESSION

Instrument of Accession of (insert full name and title).

Whereas proposals for the establishment of the Federation of India comprising such Indian States as may accede thereto and the Provinces of British India, constituted as autonomous Provinces, have been discussed between representatives of British India and of the Rulers of the Indian States and whereas those proposals contemplated that the Federation of India should be constituted by an Act of the Parliament of the United Kingdom and by the accession of Indian States and whereas provision for the Constitution of a Federation of India has now been made in the Government of India Act, 1935, but it is by the Act provided that the Federation shall not be established until such date as His Majesty may by proclamation declare and such declaration cannot be made until the requisite number of Indian States have acceded to the Federation : and whereas the said Act cannot apply to any of my territories save by virtue of my consent and concurrence signified by my accession to the Federation now therefore I (Insert full name and title) ruler of.........(insert name of State) in the exercise of my sovereignty in and over my said State for the purpose of co-operating in the furtherance of the interests and welfare

of India by uniting in a Federation under the Crown by the name of the Federation of India with the Provinces, called Governors' Provinces, and with the Provinces called Chief Commissioners' Provinces and with the Rulers of other Indian States, do hereby execute this my Instrument of Accession and

1. I hereby declare that subject to His Majesty's acceptance of this instrument I accede to the Federation of India as established under the Government of India Act, 1935 (hereinafter referred to as the Act) with the intent that His Majesty the King, the Governor-General of India with the Federal Legislature, the Federal Court and any other Federal Authority established for the purposes of the Federation, shall by virtue of this my Instrument of Accession, but subject always to the terms thereof and for the purposes only of the Federation. exercise in relation to the State of (hereinafter referred to as this State) such functions as may be vested in them by or under the Act.

2. I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the First Schedule hereto as the matters with respect to which the Federal Legislature may make laws for this State and in this Instrument and in the said First Schedule I specify the limitations to which the power of the Federal Legislature to make laws for this State and the exercise of the executive authority of the Federation in this State are respectively to be subject, whereunder the First Schedule hereto

the power of the Federal Legislature to make laws for this State with respect to any matter specified in that schedule is subject to a limitation, the executive authority of the Federation shall not be exercisable in this State with respect to that matter otherwise than in accordance with and subject to that limitation.

4. The particulars to enable due effect to be given to the provisions of sections 147 and 149 of the Act are set forth in the Second Schedule hereto.

5. References in this Instrument to Laws of the Federal Legislature include references to Ordinances promulgated, Acts enacted and laws made by the Governor-General of India under sections 42 to 45 of the Act inclusive.

6. Nothing in this Instrument affects the continuance of my sovereignty in and over this State or save as provided by this Instrument or by any Law of the Federal Legislature made in accordance with the terms thereof, the exercise of any of my powers, authority and rights, in and over this State.

7. Nothing in this Instrument shall be construed as authorising Parliament to legislate for or exercise jurisdiction over this State or its Ruler in any respect provided that the accession of this State to the Federation shall not be affected by any amendment of provisions of the Act mentioned in the Second Schedule thereto and the references in this Instrument to the Act shall be construed as references to the Act as amended by any such amendment but no such amendment shall, unless it is accepted by the Ruler of this State in an Instrument supplementary to this Instrument, extend the functions

which by virtue of this Instrument are exercisable by His Majesty or any Federal authority in relation to this State.

8. The Schedules hereto annexed, shall form an integral part of this Instrument.

9. This Instrument shall be binding on me as from the date on which His Majesty signifies his acceptance thereof provided that if the Federation of Indian is not established before the.........day of... ......nineteen hundred and.........this Instrument shall on that day become null and void for all purposes whatsoever.

10. I hereby declare that I execute this instrument on behalf of myself and my heirs and successors and that accordingly any reference in this Instrument to me or to the Ruler of this State is to be construed as including a reference to my heirs and successors.

(Then follows the attestation to be drawn with all due formality appropriate to the declaration of a Ruler.)

Additional paragraphs for insertion in proper cases :

A. Whereas I am desirous that functions, in relation to the administration in this State of the laws of the Federal Legislature which apply therein shall be exercised by the Ruler of this State and his officers and the terms of an agreement in that behalf have been mutually agreed between me and the Governor-General of India and are set out in the Schedule hereto, now therefore I hereby declare that I accede to the Federation with the assurance that

the said agreement will be executed and the said agreement when executed shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

B. The provisions contained in Part VI of the Act with respect to interference with water supplies, being sections 130 to 133 thereof inclusive, are not to apply in relation to this State.

C. Whereas notice has been given to me of His Majesty's intention to declare, in signifying his acceptance of this my Instrument of Accession that the following areas are areas to which it is expedient that the provisions of sub-section (1) of section 294 of the Act should apply, now therefore I hereby declare that this Instrument is conditional upon His Majesty making such declaration.

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ADDENDUM.

On the 1st of April, 1937, an extraordinary issue of the *Gazette of India* was published. It contained a number of Orders in Council which had been passed on the 18th of March, 1937. These Orders have made arrangements for the administration of certain functions during the period of transition from the old regime to the new. The importance of these Orders in Council which have been issued under the authority of different sections of the Government of India Act, 1935, may be appreciated from the few references given below :—

1. The India and Burma (Burma Monetary Arrangements) Order, 1937. This Order has been passed under Section 158 of the Government of India Act, 1935. It empowers the Reserve Bank of India to continue to manage the currency of Burma and carry on the business of banking in that country. It also makes, for the time being, the Indian rupee the standard monetary unit of Burma.

2. The India and Burma (Transitory Provisions) Order, 1937. This has been passed under Section 310. It lays down the provision which may remain effective for a period of one year, that if any function which before the inauguration of provincial autonomy on the 1st of April last was,

under any existing Indian law, vested in the Provincial Government, is transferred by or under the Government of India Act, 1935, to the Federal Government, it will be exercised by the Governor of the Province subject to some control by the Governor-General in Council. It is because of this provision in this particular Order in Council that the function of controlling the Calcutta University which as a Corporation serving more than one unit is a central subject is being discharged by the Governor of Bengal. The Governor of course means Governor acting with his Ministers.

3. The Government of India (Adaptation of Acts of Parliament) Order, 1937. This has been issued under Sections 311 (5) and 178 (2) of the Government of India Act, 1935. By this Order His Majesty in Council has adapted and modified a number of Acts of Parliament which have references to India and Burma, so as to adapt them to changes brought about by the new Government of India Act.

4. The Government of India (Adaptation of Indian Laws) Order, 1937. This has been issued under Section 293 of the Government of India Act, 1935. It has adapted and modified many Indian laws so as to adjust them to constitutional changes brought about by the Act of 1935. Among

the hundreds of Indian Acts thus modified are the Calcutta University Act, 1857, the Indian Universities Act, 1904, the Punjab University Act, 1882, the Bengal Municipal Act, 1932.
